TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1923

No. [redacted]78

RICHARD M. JONES, PLAINTIFF IN ERROR,

vs.

UNION GUANO COMPANY, INCORPORATED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED JULY 8, 1922.

(29,022)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 472.

RICHARD M. JONES, PLAINTIFF IN ERROR,

vs.

UNION GUANO COMPANY, INCORPORATED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 6, 1922.

1 In the Supreme Court of the United States.

RICHARD M. JONES, Plaintiff in Error,

versus

UNION GUANO COMPANY, Incorporated, Defendant in Error.

Petition for Writ of Error.

To the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, and the Associate Justices of said Court:

Now comes Richard M. Jones, the above named plaintiff in error, who would show unto this Honorable Court that in the records, proceedings and rendition of the Judgment in the above cause by the Supreme Court of the State of North Carolina, it being the highest court of said state in which a decision could be had on the said suit between Richard M. Jones and Union Guano Company, Incorporated, manifest error has occurred greatly to his damage, whereby petitioner feels aggrieved.

That in the records and proceedings it will appear that there was drawn in question the validity of a statute of said state on the ground of repugnancy to the constitution of the United States, and the decision was in favor of the validity of the law of the state, the said question being presented as follows:

The said Richard M. Jones brought suit against defendant in error alleging that his crop of tobacco was injured by reason of a harmful substance contained in fertilizer sold him by defendant in error, and although there was evidence tending to show the inferior

2 quality of said fertilizer, deficiency of its stated ingredients, and injury to the crop of tobacco, the action was dismissed and judgment of nonsuit entered upon the ground that section 4697 of the Consolidated Statutes of North Carolina had not been complied with, the applicable provisions of the statute being:

"Collection and analysis of samples; analyst's certificate as evidence. The department of agriculture shall have the power at all times and at all places to have collected by its inspector samples of any commercial fertilizer or fertilizer material offered for sale in the state, and have the same analyzed; and such samples shall be taken from at least ten per cent of the lot from which they may be selected: Provided, that no sample shall be drawn from less than ten bags of any one lot or brand."

* * * * * * *

"Provided, such sample or samples shall be drawn with the same kind of instrument used by the inspectors of the department of agriculture in taking samples."

* * * * * * *

"Provided, that no sample may be taken except within thirty days after the actual delivery to the consumer except by the state fertilizer inspector.

In the trial of any suit or action wherein there is called in question the value or composition of any fertilizer, a certificate signed by the state chemist and attested with the seal of the department of agriculture, setting forth the analysis made by the state chemist of any sample of said fertilizer drawn under the provisions of the same, shall be prima facie proof that the fertilizer was of the value and constituency shown by his said analysis. And the said certificate of the state chemist shall be admissible in evidence to the same extent as if it were his deposition taken in said action in the manner prescribed by law for the taking of depositions. The department shall refuse to analyze any sample of commercial fertilizer that is not drawn and forwarded to the department in accordance with the regulations which it may adopt for the carrying out of this article: Provided, that no suit for damages from results of use of fertilizer may be brought except after chemical analysis showing deficiency of ingredients, unless it shall appear to the department of agriculture that the manufacturer of said fertilizer in question has, in the manufacture of other goods offered in this state during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the department of agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods."

The plaintiff in error alleged that he used all of the fertilizer bought from defendant in error except two bags, which were left when he discovered his damage. It appears from the decision in the case that the plaintiff in error has a good cause of action in the absence of the statute, and that the constitutionality of the statute was the basis of the decision by the Supreme Court of North Carolina; all of which is fully apparent in the record and proceedings of the case and specifically set forth in the assignment of errors filed herewith.

Wherefore, petitioner prays that his appeal be allowed and that a transcript of the record, proceedings and papers upon which said orders were made and duly authenticated be ordered sent to the Supreme Court of the United States at Washington, D. C. under the rules of said court in such cases made and provided, and that the same may be inspected and corrected as according to law and justice should be done.

J. M. SHARP,
B. T. FENTRESS,
EDWARD C. JEROME,
Solicitors.

"Writ of error allowed.
Cost Bond $500.
WM. H. TAFT.
Chief Justice.

May 15, 1922."

Rec'd at office Clerk Supreme Court N. C. May 29, 1922.
J. L. SEAWELL,
Clerk Supreme Court N. C.

4 In the Supreme Court of the United States.

RICHARD M. JONES, Plaintiff in Error,

versus

UNION GUANO COMPANY, INCORPORATED, Defendant in Error.

Assignment of Errors.

Now comes the plaintiff in error in the above entitled cause and files the following assignment of errors on this the — day of May, A. D. 1922, and says that the judgment entered in the above cause on the — day of April, A. D., 1922, is erroneous and unjust to plaintiff in error.

I.

Because the Supreme Court of North Carolina erred in deciding that, although the plaintiff in error had alleged that defendant in error had damaged his tobacco crop by selling him fertilizer which contained a substance harmful to tobacco, and that plaintiff in error had introduced evidence tending to show the inferior quality of the said fertilizer, deficiency of stated ingredients, and injury to the said crop of tobacco, section 697 of the Consolidated Statutes of North Carolina providing "that no suit for damages from results of use of fertilizer may be brought except after chemical analysis showing deficiency of ingredients, unless it shall appear to the department of agriculture that the manufacturer of said fertilizer in question, has, in the manufacture of other goods offered in this state during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the department of agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods," *in* not void under the Fourteenth Amendment to the Constitution of the United States and is a constitutional statutory bar to this action.

II.

Because the Supreme Court of North Carolina erred in deciding that it was within the power of the Legislature of North Carolina to enact said section 4697 of the Consolidated Statutes making the introduction of a certificate of chemical analysis showing deficiency of ingredients made by the State Department of Agriculture in accordance with the provisions of said statute a condition precedent to the maintenance of the cause of action of plaintiff in error for damages on account of the wrongful insertion in fertilizer sold plaintiff

in error by defendant in error of a substance harmful and injurious to the growth of tobacco.

III.

Because the Supreme Court of North Carolina erred in deciding that it was within the power of the Legislature of North Carolina to enact said section 4697 of the Consolidated Statutes making the introduction of a certificate of chemical analysis showing a deficiency of ingredients made by the State Department of Agriculture in accordance with the provisions of said statute a condition precedent to the maintenance of the cause of action of plaintiff in error for a deficiency of the stated ingredients of the fertilizer bought
6 from defendant in error.

IV.

Because the Supreme Court of North Carolina erred in refusing to decide that section 4697 of the Consolidated Statutes of North Carolina deprives the plaintiff in error of his right of action and property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, in that it requires him to prove, in addition to damage resulting from negligence of defendant in error, dishonesty and fraud on the part of defendant in error, or that a like cause of action against defendant in error exists in favor of some other person.

V.

Because the Supreme Court of North Carolina erred in refusing to decide that section 4697 of the Consolidated Statutes of North Carolina deprives the plaintiff in error, a person within the jurisdiction of said state, of the equal protection of the law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

VI.

Because the Supreme Court of North Carolina erred in refusing to hold that section 4697 of the Consolidated Statutes of North Carolina vested an unreasonable and arbitrary discretion in the State Department of Agriculture, which deprives the plaintiff in error of his right of action and property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, the provision of said statute here questioned being:

7 "Provided, that no suit for damages from results of use of fertilizer may be brought except after chemical analysis showing deficiency of ingredients, unless it shall appear to the department of agriculture that the manufacturer of said fertilizer in question has, in the manufacture of other goods offered in this state

during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the department of agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods."

VII.

Because the Supreme Court of North Carolina erred in deciding that said section 4697 of the Consolidated Statutes of North Carolina is not contrary to the fourteenth Amendment to the Constitution of the United States in the following provisions concerning the drawing of samples for the chemical analysis required by said section for the purposes of this suit:

"Provided, that no sample shall be drawn from less than ten bags of any one lot or brand."

"Provided, such sample or samples shall be drawn with the same kind of instrument used by the inspectors of the department of agriculture in taking samples."

"Provided, that no sample may be taken except within thirty days after the actual delivery to the consumer except by the state fertilizer inspector."

VIII.

Because the Supreme Court of North Carolina erred in signing the judgment which appears in the record as the judgment of that court.

Wherefore, the said Richard M. Jones, plaintiff in error, prays that the judgment of the Supreme Court of North Carolina herein dated the — day of April, 1922, be reversed and set aside,
8 and that judgment be rendered for plaintiff in error, granting him a new trial and his rights under the constitution of the United States.

J. M. SHARP,
B. T. FENTRESS,
EDWARD C. JEROME,
Solicitors.

Received at office Clerk Supreme Court North Carolina May 29, 1922.

J. L. SEAWELL,
Clerk Supreme Court N. C.

9 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is the said Supreme Court before you, or some of you, being the highest court of law or equity of the

said State in which a decision could be had in the said suit between Richard M. Jones, plaintiff, and Union Guano Company, Incorporated, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Richard M. Jones, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-fifth day of May, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

Allowed by
WM. H. TAFT,
Chief Justice of the United States.

[Endorsed:] Supreme Court of the United States, October Term, 192-. Writ of error.

11 UNITED STATES OF AMERICA, *ss:*

To Union Guano Company, Incorporated, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of North Carolina, wherein Richard M. Jones is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this twenty-fifth day of May, in the year of our Lord one thousand nine hundred and twenty-two.

WM. H. TAFT,
Chief Justice of the United States.

12 STATE OF NORTH CAROLINA,
County of Forsyth:

We, the undersigned attorneys of record for the defendant in error in the above entitled cause—Richard M. Jones, plaintiff in error, versus Union Guano Company, Incorporated, defendant in error, hereby accept service of the above citation and acknowledge receipt of copy of same, and do hereby enter an appearance for said defendant in error in the Supreme Court of the United States.
This 2nd day of June 1922.

LOUIS M. SWINK,
W. M. HENDREN,
Winston-Salem, N. C.

13 In the Supreme Court of the United States.

RICHARD M. JONES, Plaintiff in Error,

versus

UNION GUANO COMPANY, INCORPORATED, Defendant in Error.

Bond.

Know all men by these presents, that we, Richard M. Jones, as principal, and R. M. Clark and W. R. Saunders as sureties, are held and firmly bound unto the Union Guano Company, Incorporated, in the sum of Five Hundred Dollars ($500.00) lawful money of the United States, to be paid to it, its successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 17th day of May, 1922.

Whereas, the above named Richard M. Jones has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment of the Supreme Court of North Carolina in the above entitled cause,

Now therefore, the condition of this obligation is such that if the above named Richard M. Jones shall prosecute his said writ to effect, and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

RICHARD M. JONES. [SEAL.]
R. M. CLARK. [SEAL.]
W. R. SAUNDERS. [SEAL.]

14 STATE OF NORTH CAROLINA,
County of Rockingham, ss:

On the 23rd day of May, 1922, personally appeared before me, the undersigned Notary Public, Richard M. Jones, R. M. Clark and W. R. Jones, respectively known to me to be the persons described in the foregoing instrument as parties thereto, and respectively ac-

acknowledged, each for himself, that he executed the same as his free act and deed for the purposes therein set forth.

And the said R. M. Clark and W. R. Saunders, being respectively by me duly sworn, says, each for himself, that he is a resident and freeholder of the said County of Rockingham and that he is worth the sum of One Thousand Dollars ($1,000.00) over and above his just debts and legal liability and property exempt from execution.

RICHARD M. JONES.
R. M. CLARK.
W. R. SAUNDERS.

Sworn to and subscribed to before me, this the 23rd day of May, 1922.

[SEAL] PERCY L. ORBORNE,
Notary Public.

The above bond is approved. This the 25th day of May, 1922.
WM. H. TAFT,
Chief Justice.

Filed in office Clerk Supreme Court North Carolina May 29, 1922.
J. L. SEAWELL,
Clerk Supreme Court N. C.

15 ROCKINGHAM COUNTY:

In the Superior Court.

R. M. JONES

vs.

UNION GUANO COMPANY, INC.

Summons for Relief.

The State of North Carolina to the Sheriff of Rockingham County, Greeting:

You are hereby commanded to summon Union Guano Company Inc. the defendant above named, if it be found within your County, to be and appear before the Clerk of the Superior Court, for the County of Rockingham, at his office in Wentworth on the 8th day of March, 1920, and answer the complaint, a copy of which will be deposited in the office of the Clerk of the Superior Court of said County, within ten days from the date of the service of this summons. And let the said defendant take notice that if it fail to answer the said complaint within the time required by law, the plaintiff will apply to the Court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court, this 14th day of February, 1920.

[SEAL.] J. ERLE McMICHAEL,
Clerk Superior Court.

Bond.

We acknowledge ourselves bound unto Union Guano Co., the defendant in the action, in the sum of Two Hundred Dollars, to be void, however, if the Plaintiff R. M. Jones, shall pay to the Defendant all such cost as the Defendant may recover of the Plaintiff in this action.

Witness our hands and seals this 18th day of Feb. 1920.

R. M. JONES. [SEAL.]
J. N. WATT. [SEAL.]

16 *Entries on Back.*

R. M. JONES

vs.

UNION GUANO CO., INC.

Received Feb. 27th 1920.
Served Feb. 27th 1920.

Summons for Relief.

Executed by reading and delivering a copy of within summons to W. H. Maslin, Secretary of Defendants Company.
Fee $1.00 Paid.

GEORGE W. FLYNT,
Sheriff of Forsyth County.

J. M. SHARP,
Plaintiff's Attorney.

Amended Complaint.

By leave of the Court granted at November Term, 1920, of Rockingham County, Superior Court, the plaintiff, in conformity thereto, files the following Amended Complaint, and alleges the following facts.

1. That the plaintiff is a resident of Rockingham County and is a farmer, living in Reidsville Township in said County. That the defendant is a corporation engaged in the fertilizer business, with office in Winston-Salem, North Carolina, and manufacturers and sells fertilizers to farmers in North Carolina.

2. That during the year 1919, and in the spring of said year, the defendant, either directly or through its salesman, John R. Wil-

liams, contracted with the plaintiff and 18 of his neighbors to sell and deliver to them a carload of fertilizer especially made for tobacco, the same being designated "Fish Brand" 8-2-2 Goods, and every bag marked "For Tobacco," the same being generally and specifically recommended and warranted for tobacco, and the
17 said plaintiffs purchased said fertilizer under said contract of sale and under the aforesaid warranty, that the same was good for use under tobacco, and was conducive to the growth of tobacco, the same being especially branded "For Tobacco." That the said fertilizer was not as represented, guaranteed and warranted, and was not fit for use under tobacco, nor conducive to its growth, and was not as represented or branded.

3. That this plaintiff under said representations and warranties purchased from defendant through its agent, J. R. Williams 51 bags of said "Fish Brand Fertilizer," out of said car load of fertilizer set forth in Article 2 of this amended complaint, and used the same on 15 acres of land; that said fertilizer was not as represented, and was not suitable for the growth of tobacco, but in fact and in truth contained deleterious substances not available as food for plants, in open violation of Sec. 6 of Chap. 143, Public Laws of 1917, and that said deleterious substances contained in said fertilizers in violation of Sec. 6 of said statute were not available and could not be assimilated by tobacco but on the contrary killed the roots of said tobacco plants when said roots reached the fertilizer, or prevented the roots of said plants from growing, and the said tobacco was either killed outright or only sustained its life by small rootlets growing out in the soil above the fertilizer line; that said fertilizer actually prevented the normal growth of tobacco, that it prevented the tobacco from developing as it naturally would, had no fertilizer at all been used; that said fertilizer was of an inferior grade and was composed of substances or contained substances that destroyed the productiveness of the soil and prevented the plaintiff from making more than one-fourth to one-third of a crop of tobacco; that all of said 51 sacks of fertilizer was used on good land, well adapted to the growth of tobacco; that same was properly cultivated and tilled according to the usual rules of husbandry; that the weather and climatic conditions were propitious for the cultivation and growth of tobacco and the said lands and crops of tobacco were property cultivated, and the plants were good, and properly set.

4. That neither this plaintiff nor either of the other 18 purchasers of said fertilizer are chemists, but are farmers of limited
18 means and have no chemical knowledge of the effects of fertilizer, or its ingredients or composition, and in the purchase of same relied solely upon the statements and recommendations and warranties of the defendant through its agent, and upon the analysis and statement published on the bags as aforesaid; that neither this plaintiff nor either of the other 18 purchasers of said car load of fertilizer are lawyers and knew nothing of the statute of 1917, Chap. 143; that they were unable to discover and had no cause to believe that said fertilizer was not a standard 8-2-2 goods, or that it contained

deleterious substances injurious to the growth of tobacco, for that it was branded "For Tobacco," and 8-2-2 goods, and was so recommended to them and sold to them under said contract for tobacco, until the greater portion of same was put in the ground and the tobacco planted thereon and its actual effects and results observed upon said tobacco; that its effect upon the crop was then called to the attention of the agent of the fertilizer company, to-wit, John R. Williams, and was also called to the attention of Fred S. Walker, Farm Demonstration Agent for Rockingham County, who is a representative of the Agricultural Department of the State of North Carolina, and working directly under Dr. B. W. Kilgore, State Chemist, who is chief chemist of the North Carolina Department of Agriculture, having charge of the analysis of fertilizer for said department; that the said Fred S. Walker then went into the tobacco fields of the plaintiff and examined the same and directed the plaintiff and others of the 8 purchasers to draw samples of said fertilizer and deliver to him for the purpose of having same analyzed; that the same Fred S. Walker forwarded same to the North Carolina Department of Agriculture and had same analyzed by the said Department of Agriculture, and the said Department of Agriculture furnished a copy of the report of said analysis to this defendant, to his Attorney, J. M. Sharp, and to the said Fred S. Walker, and that said analysis showed that the ingredients of said fertilizer are not that contained in standard 8-2-2 goods, there being a deficiency of the chemical ingredients.

9 5. That said samples were taken from at least one-half of all of said lot of fertilizer not at that time put in the ground, which was at least two bags; that same was drawn in the presence of disinterested persons and drawn according to the instructions of the representative of the Department of Agriculture for the State of North Carolina.

6. That just a little later and after due notice given to the Fertilizer Company, through its agent, John R. Williams, the said John R. Williams in the presence of this defendant and two or more disinterested witnesses personally drew samples from said bag or bags of fertilizer and placed the same in glass containers properly sealed, and one of said glass containers was mailed by the said John R. Williams, agent of the Fertilizer Company, to Howard Bell Arbuckle, Chemist, Department of Chemistry, Davidson College, N. C., and a chemical analysis of same was made by said Howard Bell Arbuckle, and actual demonstration of same was made in the attempted growth of tobacco, and that said chemical analysis made by the said Howard Bell Arbuckle will and does show that the said fertilizer was not up to the standard 8-2-2 goods, and that in addition to the ingredients of available phosphoric acid, ammonia and potash, it contained deleterious substances in the filler, which was death to tobacco when the roots of same came in contact with the said substance; that the said substance either killed the tobacco outright or prevented it from growing and developing as tobacco should and so retarded the growth of the tobacco that the natural elements of the soil could not be assimilated.

7. That one glass of the said fertilizer drawn by the defendant through its agent, John R. Williams, was sent to the United States Department of Agriculture and analyzed and showed that said fertilizer contained borax.

8. That while this plaintiff and neither of the other 18 purchasers were chemists, and knew nothing of chemical analysis, and were not lawyers and knew nothing of the act hereinbefore referred
20 to, or its requirements, still they allege and believe that they substantially complied with said statute in that they secured said analysis as early as they had any reason to believe that said fertilizer was not as represented and warranted, in that they acted under the direct instruction of a representative of the North Carolina Department of Agriculture, or its agent, Fred S. Walker, and in that they had samples drawn by the Fertilizer Company through its agent as aforesaid, and had chemical analysis made from samples taken from all the said fertilizer not put in the ground at that time, and which had been taken from said car, and that they did everything possible to have a fair and impartial analysis of said goods made upon discovery of said breach of contract by reason of the inferior quality of said fertilizer sold and delivered to them.

9. That the actual pounds produced on the 15 acres where the 51 bags of fertilizer was used, was 4,469, and was sold for $1,751.38; that owing to the inferior quality of the tobacco, and the prevailing prices during the fall of 1919, the loss in price on said 4,469 pounds amounted to 30 cents per pound, or a total of $1,340.70; that in addition to the above loss the plaintiff failed to produce 5,281 pounds of tobacco on said acreage that he would have produced had the fertilizer been of standard 8-2-2 goods for tobacco as represented and as branded and had contained no deleterious matter; that said 5,281 pounds of tobacco would have been worth an average of 70 cents per pound, or a total or $3,696.70, making a total loss or damage to plaintiff in the sum of $5,037.40.

10. That by reason of said inferior fertilizer containing deleterious substances in violation of Sec. 6 of Chap. 143, Laws of 1917, and by the further reason of said fertilizer not being standard 8-2-2 goods as represented and warranted for tobacco sold to plaintiff and used by him, the plaintiff suffered damages in amount of $5,037.40; that plaintiff, relying upon said contract, representations and warranties, and acting on the same, used the fertilizer and planted his
21 crop, expending much time, labor, and paid the purchase price of said fertilizer, and did not and could not discover the inferior quality of said fertilizer and its injurious effects on his tobacco until it was too late to get other fertilizer, and plants, and prepare a new crop; wherefore, by said breach of contract, and by said false warranties and inferior fertilizer not being standard 8-2-2 goods as represented by said fertilizer company, and by reason of its containing deleterious substances made unlawful by Sec. 6 of said act herein referred to, putting in said fertilizer by the defendant, all of which was known to the defendant or should have been known to it,

it being the manufacturer and seller of said goods, and the same being unknown to said plaintiff, this pla-ntiff damages in the sum of $5,037.40, and that said damages were suffered by the plaintiff because of said breach of contract, representations and warranties, and the deleterious substances contained in said fertilizer made unlawful by Sec. 6 of said Act herein before referred to, to the plaintiff's damage as herein alleged.

Wherefore, plaintiff prays judgment against the defendant in the sum of $5,037.40, the cost of this action, and for such other and further relief as to the Court may seem just and proper.

J. M. SHARP,
Atty. for Plaintiff.

(Verified Dec. 24, 1920.)

Answer to Amended Complaint.

The defendant, answering the amended complaint, says:

1. That the allegations in paragraph 1 are admitted.

2. That the allegations in paragraph 2 are denied.

3. That the allegations in paragraph 3 are untrue and denied.

4. That the allegations in paragraph 4 are untrue and denied.

5. That the allegations in paragraph 5 are untrue and denied.

22 6. That the allegations in paragraph 6 are untrue and denied.

7. That the allegations in paragraph 7 are untrue and denied.

8. That the allegations in paragraph 8 are untrue and denied.

9. That the allegations in paragraph 9 are untrue and denied.

10. That the allegations in paragraph 10 are untrue and are denied.

And for a further defense to this action, and in bar of the prosecution of this suit, this defendant alleges:

1. That chapter 113, Laws of 1917 and amendments thereto prescribe certain requirements to be performed in testing fertilizers sold within the State of North Carolina and further provides that unless and until such requirements have been complied with that no suit for damages from the result of the use of the fertilizer shall be maintained in the Courts of North Carolina; that the requirements of said statute and the amendments thereto were not performed by the plaintiff or by anyone in his behalf, and there was no pretense of a compliance on his part with the requirements of said statute and the amendments thereto and this defendant is advised and believes that this action cannot be maintained in the Courts of North Carolina.

Wherefore, this defendant, having fully answered prays judgment that this action be dismissed, that it go without day and recover its cost in this behalf expended.

(Verified Jan. 27, 1921, by W. T. Brown, Prest. of Deft. Co.)

Reply.

The plaintiff, replying to the further answer filed in this cause says: that said further answer is untrue and is denied; that any requirements set out in Chap. 143, laws of 1917, or amendments thereto, prescribing certain requirements is applicable only
23 to the Department of Agriculture of the State of North Carolina, and in no wise limits the right of a farmer to bring suit for damages, and this is particularly true where a deleterious substance was used in the manufacture of said fertilizer; that any clause in said law that attempts to abridge the right of a farmer to bring his action for damages or any other person wherein he has a property right is unconstitutional, and the said law is null, void and of no effect.

J. M. SHARP,
Attorney.

(Verified 2-3-21.)

Judgment.

This cause coming on to be heard and being heard before his Honor, B. F. Long, and a jury, at Nov. Term, 1921, of the Superior Court of Rockingham County, and at the close of the plaintiff's evidence, the defendant moved for judgment as of nonsuit and said motion for judgment as of nonsuit having been granted by the Court:

Now, therefore, upon motion of Swink and Hutchens, Manley, Hendren & Womble and Glidewell and Mayberry, attorneys for the defendant, it is considered, ordered and adjudged that the plaintiff take nothing by his suit and that the costs of this action be taxed against plaintiff and the surety on his prosecution bond by the Clerk of the Court.

B. F. LONG,
Judge Presiding.

PLTFF.'s EX. "A."

North Carolina Department of Agriculture,

Division of Chemistry.

B. W. Kilgore, M. S., State Chemist.

Analysis No. 2577 M.

DEAR SIR: Raleigh, N. C., Sept. 19th, 1919.

The sample of fertilizer material sent to the State Chemist for analysis, marked 8-2-2, contains:

Per cent available phosphoric acid..... 7.89
Per cent ammonia 1.85
Per cent potash 2.16
Per cent calcium carbonate ....

24 Remarks: Does not contain borax.

Very respectfully yours,

B. W. KILGORE,
State Chemist.

To: Mr. R. M. Jones, Reidsville, N. C.

No. 6.
Copy to F. S. Walker and J. M. Sharp.

DEFT.'s EX. No. 1.

Customer's No. 1.

Reidsville, N. C., Feb. 19th, 1919.

Union Guano Co.,

Winston-Salem, N. C.

This space is not to be used by the customer.

Order No. 7230.
Contract No. —

Section No. 32 Tax Tags N. C..... 74.97
Ship from Winston 2.25

Rate per ton, $1.70. Amount..... 77.22

County Rockingham.
Ship Acct. of Jno. R. Williams.
Ship R. G. Newman.
Destination, Reidsville, N. C.
When to ship: Next week.

This space for office use only.

Analysis.

Bags.	Brand.	Name.	Apa. ammo.	Pot.	Price per ton.	
378	Fish		8-2-2		49.25	1861.65
15			9-2-1		44.00	66.00
10			10-3-0		46.50	46.50
8			10-2-0		38.75	31.00
30			16% Acid		25.50	76.50
441						$2081.65

I will send you check for this car not later than March 1st, 1919.

JOHN R. WILLIAMS,
Customer.

25 Contract No. 146. Folio No. 0. Sec. No. 32. Salesman W. J. W.

Form 95.	Order.	Rec. ship. from ——.	Frt. Rate.	Frt. Amt.
Sheet A.	2 21 19.	Paid	1.70	74.97
		Winston	....	2.25
		Factory		77.22

Order No. 7230. County Rockingham. Tags N. C. Index 146. Shipped Feb. 25, 1919.
Customer John R. Williams. P. O. Reidsville, N. C.
In account with Union Guano Company,
Winston-Salem, N. C. P. O.
Shipped to R. G. Newman, via R. R. Station Reidsville, N. C.
Shipped in Car. NYC 239254.
Terms as per contract.

200-lb. bags.	Tons.	Brand.	Guar. analysis.	Price.	Amount.
378	37.8	Fish Brand Ammo. Tobacco	8–2–2	49.25	1,861.65
15	1.5	Qual. & Quantity	9–2–1	44.00	66.00
10	1.	Union Spl. Superphosphate	10–3–0	46.50	46.50
8	.8	Union Spl. Superphosphate	10–2–0	38.75	31.00
30	3.	Union 16% Acid Phosphate	16%	25.50	76.50
	44.1				2,081.65

Extensions Checked by C. Reconciled with for 528 by P.

DEFENDANT'S EXHIBIT No. 2.

DEFENDANT'S EXHIBIT No. 3.

North Carolina Department of Agriculture,

Division Chemistry.

J. K. Plummer, Jr., Ph. D., State Chemist.

Analysis No. 2577 M (Ref. No.).

Raleigh, N. C., Sept. 10th, 1919.

DEAR SIR:

The sample of fertilizer material sent to the State Chemist for Analysis, marked 8-2-2, contains:

26

Per cent available phosphoric acid	7.89
Per cent Nitrogen (Equivalent to Ammonia)	1.85
Per cent Potash	2.16
Per cent Calcium Carbonate ($CaCO_3$)	....
Per Cent Lim (CaO)	.....

Does not contain Borax.

Remarks: This sample was not taken according to the rules of this Department and is not, therefore, a legal sample.

The analysis is made for information only.

(Seal of N. C. Dept. of Agriculture.)

Very respectfully yours,

B. W. KILGORE,
State Chemist.

To Mr. R. M. Jones, Reidsville, N. C.
No. 6.
Copy to F. S. Walker and J. M. Sharp.
Methods of the Association of Official Agricultural Chemists.

STATEMENT OF CASE ON APPEAL.

Plaintiff's Evidence.

R. M. JONES: I am the plaintiff in this action; am engaged in farming and live four miles east of Reidsville. During the year 1919 I raised tobacco, corn and wheat on my farm and used Fish Brand 8-2-2 fertilizer. I purchased this fertilizer from John R. Williams.

Q. Was Mr. Jno. R. Williams the agent of the Union Guano Company.

Objection by defendant; sustained; plaintiff excepts.

By the Court: You will have to lay the foundation for his knowledge as to this particular question, that is, that Mr. Williams was an agent of the Company.

I made a contract with Mr. Williams for this Fish Brand guano, to be delivered at Reidsville, N. C.

Q. Do you know from whom it was shipped?

Objection by defendant.

27 By the Court: You would have to know what you are talking about, not from what somebody else says.

Answer. From the Union Guano Company, Winston-Salem.

Objection by the defendant to the answer, because it calls for a conclusion.

Mr. Swink: Did you see them ship it?

A. No, sir, I just know it was shipped; it was there in Reidsville and had to be shipped; of course, I didn't see it shipped, but I know it was bound to be shipped by someone, it could not possibly have got in the car by itself and gotten to Reidsville; I don't reckon any other Company would ship their goods. I never saw them ship it.

Defendant moves that the answer be stricken out.

The answer first above given by the witness, stating he knew who shipped it, in view of his explanation upon cross-examination, is stricken out.

Plaintiff excepts.

Mr. Sharp's Examination continued.

There was marked on the bags "Fish Brand 8-2-2, for Tobacco, manufactured by the Union Guano Co., Winston-Salem." There was an order made up for this tobacco. We had a meeting and Mr. Jno. R. Williams met with us and discussed this transaction.

Objection by defendant to anything that was said at the discussion. Objection as to what he says was on the bag.

This is a sack in which some of the fertilizer was received.

Plaintiff offers in evidence the sack and *was is on it.*

"200 lbs. Fish Brand Ammoniated Guano for Tobacco. Available phosphate 8%. Potash available, 1.65. Nitrogen 2. Ammonia 2. Union Guano Co., Norfolk, Va. V. C. C. Co. Reg. U. S. Patent Office."

I had 51 sacks of this brand of fertilizer.

JNO. R. WILLIAMS: I am the John R. Williams Mr. R. M. Jones has been talking about.

Q. Were you the agent of the Union Guano Company at that time?

28 Objection by defendant, who asks permission to examine the witness before he answers that question.

Exception by the plaintiff.

At this juncture, counsel for the defendant asks the Court to allow them to present to the witness a paper writing in reference to his agency or non-agency of the defendant, the Union Guano Company, stating that such contract, if there was one, is in writing. Plaintiff's counsel objects to this and excepts. The Court, wishing to have all the facts before it shall rule, allows this to be done.

Cross-examination.

By Mr. Swink:

The paper, marked Customer's Order #1, which is also marked exhibit #1, is the order that I gave for the fertilizer. That is my signature to the paper. I wrote on there "I will send you check for this not later than March 1st, 1919. Upon that contract the fertilizer was shipped: I had no written contract with them except this: that is the only car that I ordered and I had no written contract that season except this paper, which is marked Customer's #1.

Q. Were you the agent of the Guano Company at the time you ordered this fertilizer?

Objection by the defendant: This witness has stated that the only dealing between witness and defendant was in writing, the witness having already stated that he had no contract with them except the exhibit marked Customer's #1.

By the Court to the witness: Did you make any contract with the Union Guano Company or any of its officers other than this written —paper writing—that has been exhibited here in evidence?

A. No, that is the only car I had anything to do with; I had *not* written contract with them, as I said before and I ordered that one car because my neighbors wanted that special brand of fertilizer; I was not the agent, but I was acquainted with the Company and because they wanted it I ordered that car and I collected the money and sent it to them; I was not the agent of the Company like I had been before, only that one car, that's all. That was the only transaction I had with them that season, and that was the only car that was shipped to Reidsville that season from that Company. The Company had not authorized me to make the order, I made
29 it because the people wanted me to.

By Mr. Sharp: Had you been the agent of the Union Guano Company theretofore?

Objection by defendant. Sustained. Plaintiff excepts.

Q. Were you the agent for these farmers down there, or the agent for the Union Guano Co.?

Objection by the defendant to the latter part of the question. The Court has already elicited from the witness what his relation was, but the objection is overruled and the defendant excepts.

A. I do not know that I was agent for either one; I ordered that car because I could get it, because I was acquainted with the Company and they wanted it.

Q. When this car of fertilizer was shipped to you, was it consigned to you and title retained by the Union Guano Company?

Objection by defendant; overruled; exception.

The Court allows this in order to get any further light on the question now before the Court.

A. It was not consigned to me at all. I had it shipped to R. G. Newman, my nephew, living with me at the time, so I would know when their special car came; I didn't want it to come in my name. I had it shipped to Mr. Newnam, and the understanding with these parties was that they were to go there and open this car and deliver it; I didn't want to do the work, but I told them I would let one of my boys help unload the car.

I think Mr. Hugh Johnson got the money from the parties that got the fertilizer and turned it over to me and I sent a check to the Company; I have a check stub now that shows the amount.

Q. Did you get a commission for handling this fertilizer from the Company?

Objection by defendant; overruled; exception.

A. There was no understanding about commission at all. I never got any regular commission out of it.

Q. Were you paid anything by the Union Guano Company, anything for handling this fertilizer?

Objection by defendant; overruled; exception.

A. I was paid some expenses for handling guano when I travel some, but I don't know whether you would call that car—the
30 actual expenses I had they generally paid; if I didn't have any actual expenses I didn't have to get anything, that's the reason I had them to unload this guano because I was not getting anything out of it. The farmers only paid for the fertilizer and I sent that to the Company. I had no written contract with the Company for the year 1919. I think I went to the meeting of the farmers at Sadler's School House when they were making up orders for fertilizer; it has been some time ago, I have been there a good many times, but I am not certain about that spring, but I am pretty sure I was there.

Q. Were you there the night this order was made and put the prices on the Board?

Objection by defendant. Sustained. Plaintiff excepts.

Q. Did Mr. Jones, at any time, after buying this fertilizer, report to you, as agent of the Union Guano Company, that it was not giving satisfaction?

Objection by defendant. Sustained. Plaintiff excepts.

—. I think I went down and examined or looked at some of Mr. Jones' tobacco on which this fertilizer was used.

Q. In what capacity did you go and look at the tobacco?

Objection by defendant. Overruled; exception.

A. They wanted me to go because they got the fertilizer from me, and see how the tobacco looked, how it was growing; that's the reason I went, because I bought the car for them. I don't know that I reported to the Union Guano Company: I don't think I did. I was not called on to report it, as I know of. I was called by the Company, sometime after this suit was started, to answer some questions in regard to the matter. I guess I was called by Mr. Maslin, who is Secretary and General Manager of the Company.

Q. Did he examine you as to the statement you made to the farmers about this guano when you sold it?

Objection by defendant: overruled: exception.

A. I don't remember that he did: as well as I remember, the only thing they wanted with me was, when I got there, to know
31 who it was bringing suit against them on account of this fertilizer, and I gave them that information the best I could remember the different names of the parties. That's the main subject. I can't remember now, I don't have any idea that's all they said, but that's what we were talking about. I don't remember whether they paid my expenses up there or not, they may have. I drew the samples out of Mr. Smith's fertilizer.

Q. In what capacity were you acting when you drew the samples?

Objection by defendant; overruled; exception.

A. I think I have answered that question before, because I ordered the guano for them I felt like it was my duty to go out there and get out the samples so I could send it off and have it analyzed, as I found they wanted that done. I did that free of charge. I don't remember that I reported that to the Union Guano Company.

Q. Did you report that when they called you up there?

Objection by defendant; sustained; plaintiff excepts.

—. This fertilizer was ordered direct from the Company at Winston-Salem. I suppose that this carload out of which Mr. Jones got his 51 bags was manufactured and shipped out by the Union Guano Company at Winston-Salem, I got a bill showing they had shipped it.

Q. Was this fertilizer represented to these farmers to be especially for tobacco?

Objection by the defendant; overruled, the Court reserving the main point of agency; exception.

—. I was agent of this Company the year before and they had used the same fertilizer and on account of the result they got the year

before they wanted it that year, and that's the reason they had me to order it.

Q. Did you represent to these parties that this fertilizer was good for tobacco?

Objection by defendant; overruled; exception. The Court reserving the point of agency.

A. Yes, sir.

32 I saw a good deal of this tobacco, after it was cut and put in the barns. I didn't go to the fields to see much of it; I didn't see any of it while it was growing. I didn't go until I went to get these samples and then they had some of it in the barn.

I know the effect something had on that that was in the barn that I saw, and that's all. I don't very well know the land that this tobacco of Mr. Jones was made on.

When I went to get these samples I found a part of a sack of fertilizer, the majority of it was there, it had been full, in Mr. Kemp's crib. I got one quart sample there.

Objection by defendant; we are trying Mr. Jones' case.

I am certain it was out of the same fertilizer that I ordered from the Union Guano Company and these people hauled it home.

Q. Was it the same brand Mr. Jones had, out of the same car load?

Objection by defendant; overruled; exception.

The Court, however, will rule it out unless it is identified with the same that Mr. Jones got.

A. It was the same brand, and there was a good deal over half a sack, but it had been opened.

In answer to Mr. Swink: This was in the fall of 1919. I can't remember the date; the car might possibly have gotten there the last of February. I am not certain. And this was August or September of that same year.

Objection by the defendant to the samples; overruled. Exception. The Court reserving the question of law and the effect of this evidence.

Mr. Sharp's examination continued.

I drew two samples that day; I got one out of a sack at Mr. Kemp's, and went to Mr. A. J. Johnson's and got another. Both sacks had been opened, and they had not used but very little out of each one; they were the regular Fish Brand Union Guano, and I got a glass jar full as near out of the middle of each one and sealed it up the best I could and carried it to Reidsville and in a short time I sent both glass bottles to Dr. Arbuckle at Davidson College; I did that by request.

33 During the year 1919 Mr. Wolfe came to see me; he was what I call the field agent of the Union Guano Company.

Objection to the answer. The Court instructs the witness if he knows who Wolfe was and who he was acting for, of his own knowl-

edge, that he may answer it. The words "what I call field agent," sticken out and the witness is allowed to answer what he knows about this matter.

Exception by the defendant.

A. He was wholesale agent for the Union Guano Company, when I signed up contracts with them, I signed for the company.

Objection by defendant; overruled; exception.

The Court allows him to state this if he swears he knows it.

He came to see me early in the winter of 1919, I can't remember the date.

Mr. Swink: When was this?

A. When he came to get my contract.

Mr. Sharp: It was before this fertilizer was ordered?

Q. What did he state to you when he came to see you?

Objection by defendant; overruled; exception.

A. He just came, as he usually did, every year before to get me to sign a contract to handle fertilizer for the Union Guano Company for 1919; I told him I was not ready to sign a contract at that time, might possibly decide to use another brand of fertilizer that season, but I had some people that had got what we call "married" to certain brands that they put up that I had been handling for a few, if they would make up as much as a car load I would give them that business, but never did agree to sign a contract, but he left the contract with me with the understanding if I decided I could sign it later, but, in the meantime if I got these orders, send them in and he would fill them.

Objection by the defendant; overruled; exception.

Q. Did he authorize you to send him contracts whether you signed the contract he left with you or not?

Objection by defendant; overruled; exception.

The Court allows the witness to state what happened be-
34 tween the witness and Wolfe, what he said and what Wolfe said to him.

A. He told me if I got the orders and send them in they would fill them, and later on I got the order for this car load of fertilizer and sent it in; I think it was filled by the Company, I was not there to see it loaded but the car was billed from Winston-Salem and came to Reidsville.

Q. Who received the invoice for that car of fertilizer?

A. I did.

Objection by the defendant. Sustained, unless the invoice is produced. Exception.

I opened this car of fertilizer and turned it over to the parties, my son and one of the men that used the fertilizer I collected the money for it.

Objection, the witness has already stated that the money was collected and turned over to him by Mr. Johnson and he remitted it, gave his personal check for it. Objection overruled; exception.

The Court allows the witness to state what occurred, what he actually did about the matter.

I collected the money, or Mr. Johnson collected the money from these people who got the fertilizer and I sent it to the Union Guano Company; as I stated on that letter I would do not later than the 1st of March.

I have never heard of a Union Guano Company at Norfolk, Virginia. I have always understood that the Union Guano Company—of Winston-Salem makes this fertilizer and puts it in these sacks.

Cross-examination:

Mr. Wolfe was the travelling man of the Union Guano Company, who made contracts with its agents, and I had signed contracts with him to represent the Union Guano Company for some years prior to December, 1918 and January, 1919; but when he came to get me to sign up as agent, I declined to sign the contract, and I never did sign it. In consequence of a conversation with Mr. Hugh Johnson, after Mr. Wolfe had left, I agreed to order a car load of fertilizer from the Union Guano Company for him; I never told the Union Guano Company who I wanted it for; this is the order that I signed:

35 378 bags of Fish Brand Fertilizer 8-2-2 at $49.25, amounting to $1,861.65. I wrote on this order, "I will send you check for this car not later than March 1st, 1919," and signed my name and directed it to be shipped to R. G. Newnam, Reidsville, N. C., and according to the bill of lading it was shipped on Feb. 25th, 1919. Then I got a copy of the invoice;

Customer, Jno. R. Williams, Rockingham County. Postoffice Reidsville, N. C. and the bill calls for 378 bags of fish brand 8-2-2 at $49.25, amounting to $1,861.65; when the car came it was turned over to Mr. Johnson and others; I think Mr. Johnson collected the money from the people that hauled it out and gave the money to me, as well as I remember.

Q. Then, according to the terms in your purchase, you mailed your check to the Union Guano Company for the amount of this bill?

Objection by plaintiff. Sustained. Defendant excepts.

I expect that check is filed away somewhere; It would take me a long time to find it, but I can refer to the stub. I know the check is there, but I don't know how long it would take me to find it; if I got off in time this evening, I'll go down there and see if I can find the original check.

Yes, I took the samples from Mr. Kemp's. I would imagine there was about 175 pounds in the sack at the time, it was not quite a full sack, but nearly a full sack; it was in the corn crib. As well as I remember at Mr. Johnson's there was about the same amount, it was in his cutting-room of his feed barn.

In the order and in the bill there was 378 bags of Fish Brand; a total of 441 bags in all, 44 tons and one bag. 200 pounds to the bag, and out of that 441 bags in September I found two bags. We went to Mr. Kemp's house first. When I got there, I saw Mr. Jones; I think he had gotten his mail for that day. He showed me a report, the analysis of a sample of this fertilizer which he had sent to the Department of Agriculture, of North Carolina. I don't know who showed me a paper, but I saw a paper similar to that when I went over there that day.

36 I don't know whether it had a seal on it or not; I know I talked with some of the parties about it, but I don't know whether I talked with Mr. Jones or not, he was there in the crowd. Whether he heard anything I said or not I don't know.

I have had right much to do with fertilizer for the last 15 years. I haven't kept account of what I have done, but last spring I expect I handled about 30 car loads, 300 bags to the car, and this fall I handled ten car loads about 200 or 250 bags to the car; I expect I am doing a little more business now than I did at first.

Q. In your experience handling fertilizer, where a bag of fertilizer has been left out in the open or out in a corn crib or cutting room from the first of March to the last of August or the first of September, would the analysis which you have in your hand indicate to your mind whether or not the fertilizer originally was a good and merchantable fertilizer?

Objection by plaintiff. Overruled. Exception.

A. I am not a chemist, but my experience is when it is left out that way that it will lose ammonia but generally shows the amount of potash or acid; it will not show the amount of ammonia that was there when it was made, because time and weather will certainly make ammonia evaporate. In this analysis which I have, it shows available phosphoric acid 7.89, and the bag introduced showed 8, the percentage of ammonia here is 1.85 and should be 2; potash guaranteed 2%, and it shows 2.16; does not evaporate like ammonia. Dr. Kilgore claims it does not contain borax.

Q. At the time you got that sample, Mr. Jones was present and had a copy of that paper just handed to you?

Objection by plaintiff; overruled; exception.

A. Yes, sir, he had a copy of that paper there at that time, for I saw the copy. The way I took the samples, I got some glass jars, the kind that grocerymen get molasses in by the quart; I used my hand, shutting the fingers up and put my hand down to the middle of the bag, opened my hand, filled it with the fertilizer and drew it out and put it in the jar; I did that until I filled the jar up.

37 I did that in both instances. I had no instrument but my natural hand. Some of these plaintiffs were there and some people not interested in the matter much, just looking on; Mr. E. D. Mendenhall was there. I don't think Mr. Sharp was there.

I carried these samples to Reidsville to Mr. Sharp's office and put

them down in a corner until he could find out where he wanted me to mail them to; they were sealed the best I could seal them, they had no tape around them; that looks like one of the jars; I screwed the top down as tight as I could and wrapped them up, but I didn't put any tape around them.

The jars stayed in Mr. Sharp's office a few days. Mr. Sharp knew about the report that had been made by the Department of Agriculture of North Carolina. He had a copy of the report. Possibly a week later I went back and got the jars and mailed them; he told me where to mail them; I had left them there for safe-keeping; I didn't have a good place to put them. I have no idea how many people went in and out of Mr. Sharp's office during the time they were left there, but if anybody had tampered with them I think I would have known it. I had them tied in such a way I would have known it.

I think I addressed the package to Dr. Arbuckle. I did not know him personally. I had heard of him.

I don't know about Mr. Sharp sending out circulars to the farmers; if they heldd any meeting prior to the time the suit was started I don't know anything about it; I attended one meeting at the school house after the suit was began. I did hear that they had a meeting before the suit was begun, but I was not there.

I can't say that I am very familiar with Mr. Jones' land, but it is what we call ordinary tobacco land, good grey soil, that usually makes very good tobacco. I don't know whether it is drained. The season of 1919 was a very wet season as I remember. July and August was exceedingly wet and a great deal of tobacco was drowned out. I didn't see any of this tobacco in the field; I saw the tobacco in the barn; I saw one barn that had just been put in, green, it was very little; could have put 40,000 hills in one barn if they had wanted to. I didn't see any of it growing.

28 This fertilizer was sold about among the people in addition to this plaintiff; there was not very much of it used on my side of the branch, the bulk of it was used in one neighborhood on what we call the narrow-gauge road, but some of it was used in my own neighborhood. William Johnson used some of this fertilizer and he had a good crop, above the average for that season; his crop was the only one I saw while it was growing; him and I were kind of racing, both of us got $1.15 and $1.00 for some of our tobacco; we tied. Mr. E. B. Brand used some of this fertilizer; William Johnson is a share-cropper of his. Mr. W. W. —— got some out of that car but his was 9-2-1. I don't remember whether E. B. Brand used any of the Fish Brand on his crop or not, I didn't see his crop; it was not on the road where I had to pass, like Wm. Johnson's was. There is a Mr. George Talley lives in that neighborhood; I don't think he used Fish Brand; I do not know whether he had a sorry crop or not. Mr. J. B. Crafton and I are on the same farm; I don't know what kind of fertilizer he used.

Redirect examination:

I passed by Wm. Johnson's crop regularly; I saw his crop regularly from the time he set it out until he cut it; I don't remember that I made any remarks about his crop not starting off well. I do not know whether he used any quantity of nitrate of soda or treated his tobacco with something else; his place is about a mile from me. I don't know that there was any difference in the amount of rain that fell there and at Mr. Johnson's; but he raised a good crop and Mr. Jones didn't.

I don't know which paper I saw from Raleigh; it looks to me like this one (Plaintiff's Exhibit "A") is the one I saw. The words, "This sample was not taken according to the rules of this Department, and is not, therefore, a legal sample; the analysis made for information only," was not on the paper shown me, neither was the seal.

(Plaintiff offers in evidence paper writing marked Exhibit "A.")

This paper, Def. Ex. 1, the Company let me have a pad of them while I was their regular agent, to make out orders on and this order was written on one I had left. This differs, in some respects, from the orders I sent in. I didn't put on the regular orders, "I will send check for this not later than March 1st." I did that in order to get his March 1st discount and the farmers got that advantage.

That exhibit 2 looks like a copy of what I call an invoice for the car of fertilizer. It is the same kind I used when I was under a signed contract.

That container (of the samples) looks like the one I had; there are too many made just alike for me to swear to; I don't believe these samples had been tampered with from the time I left them in your office until the time I got them and mailed them out.

Recross-examination:

I looked at them good, I changed the seal on them; I had to pack them so that the postoffice would receive them. When they were in Mr. Sharp's office they were not sealed. They did not have tape around them; I screwed the top down and wrapped them in such a way I would know if anybody fooled with them.

R. M. JONES, recalled: I was present when these samples of fertilizer were taken by Mr. Williams; they were taken from Fish Brand 8-2-2; it was part of the fertilizer I bought; the bag had been opened before and two samples got out before, one out of each bag and sent to the State Chemist at Raleigh. These samples Mr. Williams got he got from a bag that was in a corn crib, a comparatively tight house, for a crib. I saw him get the samples; he went down in the middle of the bag as near as he could, and drew the sample out in his hand. That was a 200 lb. bag of fertilizer; there were several others there, Hugh Johnson and Mr. Kemp and Mr. A. J.

Johnson. Mr. Williams carried the samples away and I didn't see them any more. Mr. Hugh Johnson drew the samples that were sent to the State Chemist.

Q. Under whose instructions were these samples drawn?
A. Fred S. Walker.

Objection by the defendant to the answer. Sustained, plaintiff excepts.

40 The Court rules that F. S. Walker may be a competent witness to testify about this matter.

Q. In consequence of what Mr. Walker told you, what did you do?

Objection by defendant. Sustained; plaintiff excepts.

—. I had a conference with Mr. Walker about this matter.

Q. In consequence of that conference what did you do?

Objection by defendant; overruled; exception.

A. I carried the samples to Mr. Walker's office. I didn't see them any more after I left them in his office at Reidsville. I had communication from the Department of Chemistry as to these samples; the report I received didn't have the seal on it. Plaintiff's exhibit "A" is a copy of the paper I received. The analysis on the paper differs from the analysis on the bag. I am not a chemist, but I can tell there is a difference; the bag calls for 8-2-2 and the analysis from the State Chemist shows a deficiency of those ingredients.

Q. When this fertilizer was being ordered, did you and the plaintiffs in other suits against the Union Guano Company have a meeting at Salder's School House.

Objection by defendant; overruled; exception.

A. We did.
Q. Was Mr. Jno. R. Williams there that night?

Objection by defendant; overruled; exception.

A. He was.
Q. What was said there by Mr. Williams as to this Fish Brand Guano, when you were making up your order?

Objection by defendant; overruled; exception.

A. He said it was good for tobacco; he ordered the fertilizer and I used it under my tobacco; it was not good for tobacco; we fixed our land properly, set out good plants and they would not grow; a large per cent of it died; we kept planting and when there would come a little shower of rain, the tobacco would look green and an hour's sun would turn it pale and it stood there that way; never did do any good. I used 680 pounds of guano to the acre. This was good land for tobacco. We had a good season, there was

41 not excessive rain; it was a good season for tobacco. I raised something like 300 lbs. to the acre.

Q. In the year 1919 on the land you had in tobacco and the same kind of season, and same kind of work that you did to this tobacco, with the same kind of plants, what should have been the average yield of tobacco on that land?

Objection by the defendant, on the ground that he is assuming matters which are not in evidence and which, of course, cannot be testified to by the witness.

Sustained. Plaintiff excepts.

—. In 1919 the cultivation of this land was good for tobacco.

Q. With the proper kind of husbandry, proper cultivation, with the same climatic conditions you did have in 1919, with the same plants you did plant, and on the same land, if the fertilizer had been proper fertilizer, how much would it have yielded per acre?

Objection by defendant; overruled; exception.

A. 650 pounds. I can't state the market price of tobacco during 1919 in figures, but it was mighty high; the quality of tobacco I produced with this fertilizer was very common and brought only about 39c per pound, when, with the land properly cultivated, with the same plants, same climatic conditions, same kind of husbandry, with good fertilizer, tobacco raised on same land should have brought 70c.

Q. Under the conditions just described, how much more tobacco in pounds would that land have produced than it did produce?

Objection by defendant; overruled; exception.

A. Something about 5,000 pounds.

I produced, on 15 acres during the year 1919, 4,639 lbs. Mr. Martin used some of this same fertilizer; he lives three-quarters or a mile from me; I don't know what kind of fertilizer he used the year before. In the same field in 1919 where he used this Fish Brand, he used another kind of fertilizer, I don't know what kind.

I have some plants of tobacco here that were taken out of my field about the first of September, between the first and the middle. J. A. Campbell and Will Travis and Hugh Johnson were there

42 when I took up the plants; they are the average plants grown on my 15 acres, on this Fish Brand Fertilizer.

Plants are introduced as Exhibit "B."

These are some stalks that I actually cut and put in the barn and pulled the leaves off; that is the average that was grown on my 15 acres.

Stalks are introduced as exhibit "C."

These are some plants that never did have the tobacco pulled off.

Plants introduced as Exhibit "D."

I saw the bags of fertilizer before they were moved from the car, and I noticed the bags and they had stamped on them 8-2-2 Fish Brand Fertilizer, Good for Tobacco.

Q. State whether or not you relied upon the representation of Mr. Williams that this Fish Brand Fertilizer was good for tobacco when you purchased it?

Objection by defendant; overruled; exception.

Q. State whether or not you relied upon the representation as printed on the bag that it was good for tobacco?

Objection by defendant; overruled; exception.

A. I did.

Cross-examination.

I had used Fish Brand two or three years with very satisfactory results, and we made the order for 1919; I heard him say some parties were married to it. I don't know whether he had reference to me or not. I was satisfied with it and wanted it again; yes, his representations did have something to do with my buying it. I don't know whether Mr. Sharp told me to say that or not; that night at the meeting we decided to buy Fish Brand Guano; Mr. Williams was there.

Q. Did you decide, before you left home, that's what you told the jury just now, before you went to Sadler's School House.

Objection by plaintiff; overruled; exception.

A. I don't know as I decided until we got there together and made an order; we went up there to see if we could get it we didn't know we could get it until we got there and saw Williams. I don't
43 reckon we had fully decided to get Fish Brand because we didn't have a price on it, we wanted that brand if the price was satisfactory. Mr. Sharp was at the school house for one meeting, and made a talk; I didn't see the circulars if he sent out any. I didn't get any written notice to go there, we heard he was going to be there, some way or other, and we went.

I don't recall whether the samples were gotten before the meeting or after. I don't think Mr. Sharp advised us to draw the first samples. I think immediately after the first samples were drawn Mr. Sharp came in. That analysis is dated Sep. 10th, 1919, and on the bottom is "copy to Mr. Williams and J. M. Sharp"; that is a carbon copy. I never saw a copy with the seal on it. We had another meeting with Mr. Sharp besides the one at the school house; we met in Reidsville.

Q. I will ask you if there was not a notice in the Reidsville Review that Mr. Sharp would address the farmers at the school house on a certain night on the fertilizer question?

Objection by plaintiff; overruled; exception.

A. I don't know as I did. To my knowledge none of the fertilizer sed under the tobacco I am suing about was ever analyzed by any hemist; I never had it done. I went to Mr. Kemp's house first; Mr. Kemp and Mr. Hugh Johnson were there. Mr. Kemp has brought a suit against the Union Guano Company, but Mr. Johnson as not; Mr. Johnson is the man who collected the money from the armers for the fertilizer and brought the money to Mr. Williams. I lon't know what office Mr. Johnson holds with the Union; if he was n officer at that time I don't recall it; we belong to the same order, ut I don't know whether all these other plaintiffs do or not. When ve went down to Mr. Johnson's house and drew the sample, Mr. Hugh Johnson, A. J. Johnson and myself were there. Mr. A. J. Johnson is one of the plaintiffs, and the father of Hugh Johnson; e put his hand in the middle of the sack, went down as far as he ell could with his hand and drew it out and put them in something r other, I forget what. I believe it was a box. I don't know hether the sample from each bag was put in a separate box. I got a copy of that report. I don't know whether it was a week or two weeks or a month before I heard from them; it was the latter part of August or the first of September that the samples ere sent to the Department of Agriculture and I got this report he morning Mr. Williams came over there to get some more samles; I had read the report and knew what was in it. I don't think I had charged what was in the fertilizer; we didn't say there was ny borax in it, we said there was something; we are not chemists.

Yes, that report says it does not contain borax. I don't think I harged that it contained borax, but I made a charge that it conained something. I didn't know what. I haven't seen any letter that ounsel may have. Fred S. Walker wrote a letter and he sent the amples; my counsel did not read to me any letter he had written harging that this fertilizer contained borax; if I heard Mr. Sharp's peech at the school house in which he stated that borax was being sed in fertilizer, I don't recall it.

When we got this report from Raleigh, then we got another samle, we wanted to find out what it contained; I didn't find out from Raleigh what it did contain, only found that it did not contain orax; the report stated that it contained phosphoric acid, ammonia nd potash; I still think it contains borax, notwithstanding the hemist says it does not.

I can't tell all who were present at Mr. Kemp's when the samples ere drawn, Mr. Jno. R. Williams, Mr. Johnson, Mr. Kemp and myelf were there; that was after I received the report from Raleigh ated Sept. 10th; we also went to Mr. Johnsons' and got some samles, drew them out of the two sacks with his hand and put them in lass jars holding about a pint; filled each jar out of one sack; Mr. Villiams carried the samples away and that's the last I saw of them.

Tobacco sold on Oct. 1st, 1919, 15 pounds brought 71¢; 130 lbs. rought 73¢ and 100 lbs. brought 22½¢. It is true that stalks that verage like those grew tobacco that brought 73c, some brought 55c, me 26¢, some 25¢, some 76c and some 69¢, part of it belonged o a colored man that worked on the place. Sure I want the jury

to believe that 130 pounds averaging like that sold for 73c.
45 My crop for 1919 on 15 acres brought $1,751.32. I don't know what the crop brought in 1920, but I know that 14 acres raised something like 900 lbs. an acre. I can't tell what it brought. I haven't got the 1920 bills, those are the 1918 bills; in 1918 I had out about 14 acres in tobacco, I think it brought something like $4,000.00, those bills of R. E. Jones are included in the crop; he is my son, and Jones & Guerrant are included in the crop too. I don't know what the 1920 crop brought.

Redirect examination:

Tobacco prices in 1919 were much higher than 1920; my 1918 crop on 14 acres brought something like $4,000.00. These are the bills for the 1919 crop marked Exhibit E. These are the bills for 1918, and are marked exhibit F.

FRED S. WALKER: I am Agricultural Agent for Rockingham County (yes, in plain English, County Demonstrator.) In the year 1919 I was working under C. R. Hudson, State Agent, and Dr. Kilgore as Director of Extension Service and State Chemist.

Sometime in the year 1919 I went down and inspected the tobacco of Mr. Jones, it was planted on average grey land, good tobacco land. I didn't see his tobacco until the latter part of August, or the first of September, but the condition of the soil at that time and the condition of the land indicated that the tobacco had been well cultivated, no grass, the land was clean and in good condition. That was a very favorable season, I would not think the amount of rainfall would have had an injurious effect on tobacco. I would think he had 10 or 15 acres; his tobacco was in a very poor condition, very small, that sample there compares very well with a lot of the tobacco I saw.

Q. When you went down there, state whether or not you instructed Mr. Jones to get samples of that fertilizer for you to have analysis made?

Objection by defendant; overruled; exception.

The Court reserves its final ruling with regard to these matters, as it has stated to counsel and will make such ruling later.

A. Mr. Jones asked me about having analysis made and I told him I would be glad to send the samples to the State Department
46 for analysis, and I told him that he would have to get two disinterested parties to draw the samples. Mr. Jones brought some fertilizer to my office; of course, I can't tell where it came from, but he brought some to my office and I sealed it up and addressed it to the Agricultural Department and gave it to him to mail. This is a copy of the letter I wrote, dated October 18th, 1919.

Defendant objects to the letter.

The Court admits the following portions of the letter.

Co-operative Extension Work in Agriculture and Home Economics,

State of North Carolina.

Dr. B. W. Kilgore, Reidsville, N. C., Oct. 18, 1919.
Raleigh, N. C.

DEAR DR. KILGORE:

Under separate cover I am mailing to the Chemistry Department two samples of fertilizer to analyze. Please have analysis made and report to Mr. R. M. Jones, Reidsville, N. C., Route 6, your findings, as early as possible; and if it is not asking too much, I would like to have a copy of your reply to Mr. Jones, and oblige.

Yours very truly,

_____,
County Agent.

As to the other portions of the letter, the same is not admitted in evidence. Defendant's objection is withdrawn, and the plaintiff does not except.

I don't think there was anything written to the Department by me as to that fertilizer containing borax; I don't know that Mr. Sharp or any other counsel connected with this matter had anything to do with sending those samples to the State Chemist. I don't remember that I wrote any more. I may have. I don't remember that I wrote the Department to send Mr. Sharp a copy of the analysis. I can't give you the county average price of tobacco for 1919; I can give you the State average.

Q. What was it for the State?

Objection by defendant; overruled; exception.

A. Approximately $54.00 per hundred.

47 The Court states to the jury that it will leave this matter open to the inquiry as to the market price of tobacco in Reidsville.

I have been using fertilizer and growing tobacco all my life, ever since I have been large enough to have anything to do with it.

Q. Have you an opinion satisfactory to yourself, after examining the tobacco in that field, as to whether it was injuriously affected by the fertilizer put under it?

Objection by deft. sustained; plaintiff excepts.

I saw the tobacco grown by Mr. Kemp, Mr. Jones, Mr. Chaney, Mr. Daniels and Mr. Johnson. All this tobacco was in a very bad condition, similar to what I found in Mr. Jones' field.

Cross-examination:

I am a county demonstrator, elected by the Board of Commissioners; the county pays part of my salary and the United States and the N. C. Department of Agriculture co-operating. Check for half of it comes from Washington; no, I do not get it that way; get one-fourth from Washington, one-fourth from Raleigh and one-half from the County. I am not a fertilizer inspector; not working under the authority of the Department in Raleigh to inspect fertilizer and have nothing to do with that. I was not present when these samples were taken, all I know is that the two packages were brought to me; they were cardboard packages; they were not the 20 Mule Team Borax boxes; they were square 4 inch boxes; Mr. Jones brought them to me; they were not sealed; I sealed and directed them, in the same boxes they were brought to me, and he carried them to the postoffice. I addressed it to Department of Agriculture, Chemistry Division, and wrote Dr. Kilgore a letter, on August 18th, 1919, and got a reply about Sept. 10th. I have a carbon copy of what has been offered in evidence.

July and August were right wet months, I don't think it was the wettest season we have had for a number of years. The crop was considerably shorter for 1920, in pounds, but I don't think that particular summer, in this particular section drowned out any
48 worse than on former seasons: I know that this county averaged 650 pounds per acre, notwithstanding the weather.

Redirect examination:

That is not exactly the same as the report I received.

Recross-examination:

The analysis is the same, and everything is the same except the stamped part to the effect that the sample was not drawn according to law and was not legal evidence, and the seal; this that I have looks like a carbon copy of the original.

HUGH JOHNSON: I am not a plaintiff in any of these law suits. I drew the first samples from sacks, one in Mr. Kemp's crib, and one sack at my father's stable; neither sack had been opened up to the time I went to get the sample. We opened the sack and I drew it out with my hand, went down in the center of the sack as far as I could and pulled it out with my hand. I do not remember who else was present, there were several there. This was Fish Brand 8-2-2 fertilizer, in a sack just like the sacks that came from that car. Mr. Williams' son helped me unload this car of fertilizer; all we got was shipped in one car and was unloaded to the different farmers who came for it; Mr. Kemp and Mr. Jones and all these 19 plaintiffs got some of it. Mr. Williams got me to help unload that car. I was at the Sadler School House the night that the order was made for this Fish Brand fertilizer.

Q. What statements — made there by Mr. Jno. R. Williams about this Fish Brand Fertilizer?

Objection by defendant; overruled; exception.

A. He said it was good guano and that he could get it for this Union if they wanted it and witthout them putting up the money, he said it was good guano, as good as any guano, but some other company had offered him a better contract but he still could get this guano juse like we had been getting it (it?) we wanted it. Mr. Jones was there.

Q. Was any statement made by Mr. Williams as to what this fertilizer was good for?

Objection by defendant; overruled; exception.

49 A. I don't remember what he said; he said there was no difference in that guano and the Old Buck, one was as good as the other.

Q. Did he make any statement as to what Old Buck Guano was good for?

Objection; overruled; exception.

A. He said Old Buck should be the best guano there was; he talked a little more, but that is about all I remember. I took the samples out of Mr. A. J. Johnson's bag; I can't swear it was the particular bag that came out of this car, but it was the same analysis. This was my father, and he didn't buy any other Fish Brand fertilizer except that that came out of that car. I was present when Mr. Jno. R. Williams took samples of fertilizer at both places. I saw several fields of this tobacco growing.

Q. What kind of tobacco was it?

Objection by defendant; overruled; exception.

A. It was very small tobacco, very small.

Q. Was this land of Mr. Jones adapted for the growth of tobacco?

Objection; overruled; exception.

A. It was as good average land as is in the neighborhood for tobacco. I saw it cultivated, appeared to be as well cultivated as it could be.

Q. When Mr. Jones and these other farmers discovered there was something wrong with the growth of their tobacco, could they then have gotten other plants and other fertilizer and made a crop that year?

Objection by defendant; sustained; plaintiff excepts.

Q. Did you observe anything wrong with the growth of this tobacco?

Objection by defendant; overruled; exception.

A. It was very small and as I said when we pulled up some of it, the only roots that appeared to be doing anything were the roots near the top of the ground. I examined this tobacco right around the first of August or the middle.

Cross-examination:

At that time I held no position with the Farmers' Union; I am Secretary now; I am pretty sure I was not Secretary at the time of this meeting at the school house; we went there to the school
50 house to decide what kind of guano we would buy; some of them had used it before; Mr. Jones said he had; Mr. Williams said it didn't make any particular difference to him what we bought. I have heard him say Old Buck should be the best guano there was, but I don't know whether he said that in the meeting or not, but the farmers got him to buy Fish Brand for them. When the fertilizer came I collected the money for it and deposited it in the Bank to Mr. Williams' credit. I didn't use any of this Fish Brand in my individual crop. I think Mr. Brand got some of it. I don't know about the crop he made; he lived two or three miles from me. Martin was my tenant, he used four or five sacks of Fish Brand; he didn't make a crop fit for anything; it was just about like Mr. Jones'. I delivered this fertilizer about March and the samples were taken about the last of August out of two bags; the other fertilizer was in the ground. We opened the sacks and went down as near the middle of the sack as I could with my hand. I don't remember what I put the samples in. I know it was some kind of box or jars or something of that sort; I don't know who took charge of them then.

I am a son of A. J. Johnson; he is one of the plaintiffs and my tenant Martin has a suit; I am not a party to that suit; I couldn't bring suit for one-fourth of a sack of guano. I was not advised to stay out and be the disinterested party; I stayed out because I didn't want to go in. No, I had not rather be a witness. I haven't signed any agreement about costs to be divided among us. I may have seen that agreement; there was a list of all the names of the people who were going to bring suit; we were trying to find out where the car of guano went to; the whole bunch was present, practically all those who are bringing the suit. Mr. Sharpe was not there.

I don't know what became of that list; I haven't seen it since; I have heard Mr. Sharp make several speeches at the school house on several occasions; I heard what you call his fertilizer speech.
51 I don't know whether it was a good one or not. I remember the notice published in the Reidsville paper, but I don't know whether it was before or after the suits were brought.

I don't know what he said; I don't know whether they tried to get William Johnson or not. I did not hear any statement at that meeting about making him keep his mouth shut, not anything like that. I don't recall hearing him discussed. I don't know whether he had a good crop or not, if I saw it I just saw it passing along the road. I lived in about two miles of him, then.

Redirect examination:

I don't remember hearing Mr. Sharp mention William Johnson's name one way or the other about the suit. I have never heard of any agrement to "pool" the costs in this case. The night of the meeting at the school house, I don't know whether Mr. Sharp was there representing the farmers in these suits or not.

J. A. KEMP: I am the man out of whose sack the samples were taken; it was Fish Brand Fertilizer 8-2-2, I bought from the Union Supply Co. of our District; it was a bag out of the car load that we have been discussing.

I was present when both samples were taken.

Cross-examination:

We got it through the Farmers' Union. I can't read nor write, but they made up the order. I gave Mr. John R. Williams the order for it, over there at the Union meeting, and the order was turned over to Mr. John R. Williams, our agent.

I didn't sign any agreement to "whack" up the costs; I have half interest in one suit and whole in the other, am suing for something over $4,000 in both cases.

52 I got 40 sacks. I have forgotten what it cost. I don't know whether Mr. Williams sold it to us at what it cost him or not.

I am asking for damages. I have got a statement of it but I can't carry it in my mind and I can't count it up, but it is something over $4,000.00 in both cases; this bag was left over and put in the barn; when I got ready to cure tobacco in the barn, I moved the sack up in the crib and they got the second sample from the crib.

I was present when the drawing took place, and Jones and Hugh Johnson at the first time and the second drawing there was a whole crowd there.

I went down to the school house, I heard Mr. Sharp make several speeches down there, but I don't know as I heard him make any straight out fertilizer speech. I don't know anything about the notice in the paper, but we had all started our suits before that meeting.

I am brother-in-law of John R. Williams.

53 A. J. JOHNSON, for plaintiff, testified: Some of these samples were gotten out of a bag of fertilizer at my house; it was this same Fish Brand. I kept it in my feed barn; there were two or three there when the first samples were taken, I don't know as I could call their names. I think Mr. Will Crafton was there when the second samples were taken; this bag of fertilizer was taken from that car load of Fish Brand fertilizer.

Cross-examination:

I don't know whether my suit is $100.00 a bag or not, I got about 20 bags and both of my cases are about $900.00, Fletch and I together. We come down some down to $50.00 a bag, it cost me about $4.90 a bag; the two suits one $905.00 and the other $435.00 makes $1,340.00. I don't know how much this case will cost me, I am going to pay my part; it is the agreement to "whack" up the costs if we make a mis-fire of this suit.

I didn't go to the meeting that night, I live two miles away and I didn't go. I didn't see any notice in the paper.

Redirect examination:

I signed a cost bond in my suit; I don't know anything about any agreement to pay any costs in any suit except mine.

Recross-examination:

When you asked me about it awhile ago, I didn't understand; I don't reckon I'll pay any costs but my own; I didn't sign any agreement to "whack" up on the costs in the other suits.

J. R. MARTIN, testified for plaintiff: I live on the lands of Mr. Hugh Johnson, I used some of this Fish Brand Fertilizer; I live about two miles from Mr. Jones. In the same field with this Fish Brand Fertilizer, I used some Fish Brand that I bought last year; there was a whole lot of difference in the tobacco that I raised with the Fish Brand I bought last year and that that I bought this year.

Objection by defendant, overruled, exception.

Q. Tell the jury about it?

Objection by defendant, overruled, exception.

54 A. It was mighty small that that I raised on the 1919 fertilizer; that that I raised on the 1918 fertilizer was good tobacco it was Fish Brand. All that I used didn't come out of this car, some Mr. Hugh Johnson got the chemicals and mixed it.

Defendant moves to strike out all this evidence, sustained. Plaintiff excepts.

No, I didn't have any Fish Brand carried over from the year before.

Cross-examination:

I have got a suit, too. I didn't use any big quantity of this fertilizer, I don't know whether mine is $100.00 a bag or not, I got five bags and am suing for $750.00, the five bags cost me $24.50 and I want back $750.00. I suppose the tobacco I raised is just like that Mr. Jones raised; I have got my tobacco bills mixed up, Pearl Martin is my daughter. I sold some tobacco at 69¢ some at 77¢, some at

76¢, some at 50¢, some at 63¢, some 79¢ and some at 88¢. I sold about 600 lbs. I was not at the school house when Mr. Sharp was there; I started my suit the same time the others did; I think Mr. A. J. Johnson signed my cost bond; he has a suit, too.

Mr. TARVIS, for plaintiff testified: I have no suit against the Guano Company and did not use their fertilizer. I examined Mr. Jones' tobacco. This tobacco here has been air-cured not flue-cured. I selected these plants out of every field of tobacco he had; I was asked to and I did select an average plant out of every field, it was all just about alike; I didn't see any indications of too much rain.

Cross-examination:

Tobacco like that would not bring 73c; this was pulled up and air-cured and the other was cut and cured by flue; yes, that is average tobacco out of his crop; he had not cut any out of the field when I got this, I think he was getting ready to cut it; I didn't pull it up at the end of the row, I went to the middle of the field. I don't know what his tobacco brought. I raise tobacco, but I don't know what mine brought. I think I sold the last two lots $105.00 and $104.00 average, I think. I sold it at Jno. Watts along in November.

55 ROBERSON SAUNDERS, testified for plaintiff: I had used Fish Brand Fertilizer prior to 1918; I was at the Sadler's School house the night Mr. Williams was there.

Q. What statements and representations were made by Mr. Williams, if any, in regard to this Fish Brand Guano?

Objection by defendant, overruled, exception.

A. When the fertilizer subject was first brought up, he took a piece of chalk and got up to the blackboard and began showing or describing the analysis on that bag, first showing the plant food and so on, and we decided to use the Fish Brand, the majority of us and he stated that he could order it from the Company and that it was good for tobacco and he could order it as he had been ordering it. He had before this represented the Union Guano Company. I saw one of Mr. Jones' fields on the road.

Q. What was the condition of that tobacco?

Objection by defendant, overruled, exception.

A. About like these samples here, very poor.

Cross-examination:

I have one suit in my own name. I used about 60 bags. I am asking damage $2,500.00, that is less than $50.00 a bag. One of my tenants used 30 bags and the other 9 or 10, one is suing for $1,500.00 and the other $1,000.00. I think Frank Graves used possibly 12 or 14 bags.

I haven't the figures with me; he got $969.74 for 1,805 lbs. of tobacco and is asking $819.92.

I was at the school house. Mr. Williams didn't try to get us to buy Old Buck Guano; he set up the analysis and plant food of both grades of fertilizer and he said he could get it in the same capacity he had been getting it, in the same way he had been ordering it.

Anderson Cole is also my tenant, I don't know how much he got for his. Mr. Williams, at that meeting told us he was not representing the Guano Company, but he said he would buy the Fish Brand if we wanted it.

Mr. SNEAD, testified for plaintiff: I have a ledger that I
56 keep to show the average market price of tobacco during 1919.

Objection by defendant, on the ground that these bills range from October 1st-24th. Overruled, exception.

The market opened first of September, and I have it from that time on. For the season, the average was $55.30.

Objection by defendant, overruled, exception.

The Court allows him also to state in this connection, what was the average market price of tobacco for October.

A. $53.08, that's on Watts' Warehouse floor.

Q. Do you know what the average market price there was on the same warehouse floor for the crop of 1920?

Objection by defendant, overruled, exception.

It is admitted in regard to another phase of the question which may go to the jury or not. The question of law, on this point, however, is reserved.

A. Crop average for 1920 was $21.91.

Q. What was the average for 1918, if you know?

Objection by defendant, overruled, exception.

The Court allows the evidence, the Court stating, however that the question of law involved is reserved for explanation later to the jury.

A. $34.00.

Q. Do you know the kind of tobacco farmer Mr. Jones is?

Objection, overruled, exception.

A. I regard Mr. Jones as a good tobacco raiser.

Objection to the answer.

By the Court: Are you speaking of personal knowledge?

A. Yes, sir. I have been seeing his tobacco sold there for a number of years, passing around and looking at it.

Q. Now does the sales of Mr. Jones' tobacco compare with the average sales of tobacco on your floor?

Objection by defendant, sustained, plaintiff excepts. The witness may state, if he knows, the kind of tobacco Mr. Jones sold on the floor of the warehouse that year.

A. I saw some of his tobacco and it was not as bulky and as
57 good, not as large piles, and didn't weigh as much as his tobacco usually weighed.

Cross-examination:

Some of the other farmers were in the same boat, the crop that year was not considered a heavy crop; I can't say whether it was just about half a crop or not.

Our sales were not more than that proportion, but a good deal of tobacco went to Danville that we thought probably belonged to us. It was not a heavy crop; I don't recall there was much second-growth tobacco that year. I don't remember that the rainfall was so very heavy, but I think I would be safe in saying that it didn't rain every day; I don't know anything about the soil on Mr. Jones' farm, except in a general way, passing by the road; it is grey soil. I can't tell you about anybody's crop. I just brought the general ledger. I received instructions to bring a book that would show the average; I have a record of his sales, but it is in the sales book in Reidsville. I have a record of Mr. Jones' crop for the year, 1919, and I leave it here, marked "Exhibit 5."

Redirect examination:

It was suggested to me, I think, some time in the Spring that I would be supernaed here as a witness and I was asked to get these things up to save trouble.

Recross-examination:

Mr. Jones gets the originals when the tobacco is sold. On those bills, Exhibit 5, the name appears at the top of the bill.

W. P. Daniels, testified for plaintiff: I have a suit against the company and I am one of the parties who met at Sadler's school house and discussed the matter of ordering this Fish Brand Guano. Mr. Williams was there.

Q. Will you state to His Honor and the jury, what statement was made by Mr. Williams there about this fertilizer?

Objection by defendant, overruled, exception.

A. We met there and Mr. Williams came down and put on the blackboard, the analysis of the Old Buck Guano and gave us prices and all and we asked him to explain the plant food in it and
58 he did and he gave us prices and we told him we didn't want that kind, and he put the analysis of the Fish Brand up there and told us that was as good as Old Buck and he could get that for us if we would make up an order and turn it over to him, that that was just as good for tobacco as the Old Buck. He said he had sold it to us before and he would order it just like he had been doing, we didn't ask him how he ordered it before.

Q. Had he previously been the agent of the Union Guano Company?

Objection by defendant, overruled, exception.

A. Yes he had; I bought fertilizer from him the year before. The analysis on the bags is Fish Brand, 8-2-2. I saw that before I took it out of the car and the same thing was on all the bags I saw. I can't tell how many I saw, but I stayed there most of the time the day we unloaded.

I live about a mile and a quarter this side of Mr. Jones.

Q. State whether or not you used this Fish Brand 8-2-2 fertilizer as represented here during the year 1919?

Objection, overruled, exception.

A. Yes, sir, I used this same fertilizer that came out of the same car.

Q. What effect, if you know, did that fertilizer have on your crop?

Objection, overruled, exception.

A. I can tell you how it was growing at different times; if they would come a rain it would freshen up and look like it was going to grow; and if the sun came out it would stop growing and turn yellow.

Q. Did that tobacco grow to any size?

Objection by defendant, overruled, exception.

A. Mine did not. I had some fertilizer Fish Brand 8-2-2 that I carried over from the year before, that I bought from Mr. Williams, and I used that the same year.

Q. How did the tobacco grow on that land, over that fertilizer, the same kind of season and cultivation, compared with this guano that you bought out of this car?

Objection, overruled, exception.

A. The tobacco that I planted on these two sacks grow-
59 ed off and flourished; it was the only tobacco I had that was any account, 447 pounds, net price of $182.35. Bill is marked Exhibit G. I used the Fish Brand in 1919 on 5½ acres. I tried to use the guano all alike. I used 1,200 pounds under the tobacco represented by that bill. I had a piece of old field 2,900 hills, counted that I used the guano that I kept from the year before.

Q. How much did that grown on that land weigh?

Objection, overruled, exception.

A. It weighed 292 pounds and brought $221.80 clear check.

Cross-examination:

I put two full bags of fertilizer under 2,900 hills, no, I made a mistake, it is 3,900 hills, that is less than an acre; there are about

3,000 hills to an acre. I don't think I said in my complaint that I used 16 bags that I bought on 5½ acres; on this old field I used two sacks. Mr. Sharp has the other bills; some sold 205 pounds at 55c, 40 pounds at 73c, 41 pounds at 76c. I don't remember how much fertilizer I used.

I didn't take my tobacco and compare it with Mr. Jones'; mine was about the size of this; if you take that tobacco and flue-cure it *and* it would have looked better.

I was at Sadler's school house the night Mr. Sharp came there. I was not there the night the suit was brought; I didn't see the notice in the news-papers for all to come to the school house; we had gotten the analysis back on the fertilizer we sent off and he was showing the analysis he had gotten back; I never met Mr. Sharp there about the suit. I was there when they brought the analysis; I don't remember the date the plaintiffs all met Mr. Sharp there; it was not before the suit as brought when I met him there; we had made up the papers and everything. I haven't made any agreement about "whacking up" on the costs. R. F. Jackson is a neighbor; I think he is one of the plaintiffs. I don't know whose cost bond I signed; we didn't sign to "whack up"; we met Mr. Sharp in 1919 and 1920, too; he has made a good many speeches down there. I don't know how many; he hasn't made any about this fertilizer that I know about; I don't know how much damage I am asking, it is on the papers. I used 16 bags of guano and I am asking for $1,992.04. I raised the price according to the price I got for my tobacco. I don't know how long we were at the school house before the goods were ordered; I didn't hear Mr. Williams say he was not the agent of the Union Guano Company; he said he was representing the Old Buck but he said he could get the Fish Brand for us the same as we had been using but he didn't say whether he was agent for it or not. We paid cash for it and turned the money over to Mr. Johnson and he turned it over to Mr. Williams.

The land that I put the 1918 guano under was an old field burned off in the Spring; the other land was second-year land. Where I put the two sacks, had not had a crop on it the year before, but it was not new ground, the other land had had tobacco on it the year before, about a quarter of a mile apart, and on a different part of the farm. I had used Fish Brand guano the year before and liked it that year, at the school house that night, the majority voted for Fish Brand.

Redirect examination:

It had been recommended to me as a good fertilizer for tobacco.

I. D. MENDENHALL testified for plaintiff:

Q. In the year 1919, in this County, I went where they said this Fish Brand fertilizer was used. I didn't see any in the fields; I saw what they told me was that tobacco in Mr Chaney's barn; they were putting it on the sticks. All I know is that they told me it was tobacco under which this Fish Brand Guano had been used.

Cross-examination:

I live in Greensboro, and I represent the Old Buck Guano Company; I think it is a good guano. I wouldn't sell it if I didn't think so.

Dr. HOWARD BELL ARBUCKLE testified for plaintiff: I am a teacher of chemistry; I studied chemistry first at Hampton
61 Sidney College, Virginia; then at the University of Virginia two seasons, and then finally at Johns Hopkins University, where I completed the course and I am proud to say that they gave me my doctor's degree for a thesis on chemistry, in 1898. My first teaching was at Agnes Scott College, in Georgia, there I was professor of biology and chemistry. I have been connected with chemistry ever since and I associated with my studies biology, as well. For nine years at Agnes Scott College, I had charge of that work; now I am professor of chemistry at Davidson College, Mecklenburg County, this State, where I have been for about nine years. I received from Mr. Williams, a package containing two jars of fertilizer. This is one of the jars. I made analysis of that fertilizer, I didn't know the purpose of the analysis, as a chemist I have studiously avoided making analysis of this sort. I made the analysis of the fertilizer; at least we did in the laboratory.

Q. Were you instructed to make analysis of the fertilizer for any specific ingredients?

Objection by defendant, overruled, exception.

A. There was no request, I was simply asked for an analysis of this fertilizer; for no purpose whatsoever. The analysis was made in our laboratory, directed by Mr. Thies, under my supervision.

Q. Did that analysis show a deficiency of any of the ingredients?

Objection by defendant. The Court reserves, as heretofore, the question of law arising upon the evidence. Exception.

It is understood that this objection and exception shall obtain to all of the evidence of this witness in regard to the analysis of these two samples.

A. I cannot recall certainly whether I was informed as to the analysis on the bag; there was no mark on these packages to indicate its previous analysis; I think it was afterwards that I had knowledge of it.

I think I will make very little mistake in saying that the fertilizer contained 8.3 available phosphoric acid; 2.27 potash and 1.32
calculated as ammonia, nitrogen 1.097. These are the figures
62 that were sent in after Mr. Thies had made several analyses of the fertilizer; I do not recall whether they were sent in with the first report of the analysis before we had any knowledge of the purpose of the analysis. We made actual tests of the use of this fertilizer on tobacco in our own laboratory.

Q. Did this fertilizer contain deleterious substances?

Objection by defendant, overruled, exception.

A. I found that this fertilizer contained some agent that interfered with the growth of tobacco.

Q. Was this agent or substance deleterious for the growth of tobacco?

Objection by defendant. Defendants asks that his objection and exception shall obtain as to all evidence elicited on account of these experiments.

A. Yes, sir, with the tobacco plants that we used. This study extended over a period of several months; the second experiment began on the 15th day of January, 1920, with medium sized tobacco plants; we had a series of nine boxes ten plants set out in each box. We calculated at the rate of 600 pounds to the acre; these calculations have all been worked out carefully; we used this fertilizer under the plants in Box No. 1, the plants were much injured, four of the ten died, the others grew very little.

In Box No. 2 we used at the rate of 1,200 pounds per acre this was used in the row; these plants were much injured, 6 of the 10 died, the others showed no growth.

In Box No. 3 used the fertilizer from the same sample from which we had removed the chlorine, at the rate of 1,200 pounds per acre; one of the 10 plants died and the rest grew well up to March 25, at which time, of course, this particular experiment was concluded.

In Box No. 4, sample of fertilizer that was made in the laboratory, containing phosphoric acid 8% potassium sulphate 2% and sodium nitrate 2%, used at the rate of 1,200 pounds per acre; all plants living and growing well on March 25th. We prepared this fertilizer from chemically pure material in the laboratory. It was not
63 commercial fertilizer.

Box No. 5, fertilizer similar to that used in Box No. 4, except that we substituted potassium chloride for potassium sulphate in this box, in which we used the same quantity of plants, all plants were living and growing well until March 25th, the conclusion of the experiment.

Box No. 6, fertilizer prepared containing 8% phosphoric acid, 4% potassium sulphate and 2% of potassium carbonate. 8 of the 10 plants were living and growing well on March 25th.

Box No. 7, fertilizer was prepared containing 8% phosphoric acid, 4% of sodium nitrate and 4% potassium sulphate; in this box all 10 plants were living, but growth not so good.

Box No. 4, fertilizer was prepared, analysis 8-2-2 using at the rate of 1,200 pounds to the acre, in which the potassium chloride was used, this time applied in a solution, full solution applied to the plant; 9 of these plants were living and growing on March 25th.

Box No. 9, fertilizer prepared 8-22, containing the same ingredients, potassium chloride except the powdered form, the fertilizer was applied in the row in the usual way; all plants alive and every one growing well on March 25th, all save one and this one still living. These are the experiments upon which I based my statement that the samples of fertilizer contained something that was injurious to the growth of tobacco; then, there was a special test in order to de-

termine how we should proceed with this tobacco and this was preliminary to a more extensive experiment and was made in the laboratory with as great accuracy as to quantities of fertilizer, to the kind of soil to test in field where we could quickly see the result of it and in this case, we used two plants in each of these vessels.

=1, no fertilizer, just the soil; the plants lived but of course, did not flourish. =2, we used water solution of this sample of fertilizer which we analyzed and applied it as near as we could at the rate of 1,200 pounds per acre, which we felt was probably the limit in the use of this fertilizer; these plants were dead on the third
64 day.

=3. We used the water solution of the same fertilizer but used half the amount; the two plants were killed on the second day.

=4. We used the residue after the soluble matter was removed, representing about 6,000 pounds was used; there was very little growth, but the plants were healthy.

=5. Petroleum ether, 1,000 pounds of this sample was used; the plants were living, but no growth shown.

=6. Ethel-ether extract of the fertilizer was used, a little better than petroleum-ether, but small growth.

=7. We took the residue, that is in these three experiments, for our own interest after we had taken a water solution, we took the water solution of the same amount of fertilizer, evaporated it down to dryness, being very careful of course, with the heat and took on that residue with hydrochloric acid; that was used on two plants; the plants showed little growth; the same thing was done, in turn, with sulphuric acid and nitrate acid; I knew that these acids would dissolve the material that the water had taken out of the fertilizer and we used it to see what effect it would have upon the tobacco, and this was the result:

=11. Same quantity of sample was dissolved in water, evaporated carefully to dryness with heat not exceeding 130 degrees; used this on two plants, we had marked growth, very distinct and marked growth. This was all done with these samples; the same fertilizer which produces this injury in the tobacco plants showed by this experiment that the heat removed whatever substance or agents that had interfered with its growth and we had marked, decided growth in these two plants.

Then we tried as another experiment, in order to check this up, a sample of the laboratory fertilizer, prepared 8-2-2 out of the chemically pure material and used it in exactly the same way it was used on these two plants, in another vessel; on these two plants, I used the word "fine growth;" it was upon that that I based my statement that the fertilizer contained something that was injurious to
65 the growth of tobacco.

Q. From your experiment are you prepared to say whether or not this fertilizer, when exposed to the sun-light would be less injurious to tobacco than if it was not exposed to the light and heat of the sun?

Objection by the defendant, overruled, exception.

A. In our subsequent experiments, we found that this fertilizer, exposed to the sun-light and heat which probably came in through a south window, imprisoned in this small room, under these circumstances, the fertilizer was rendered almost harmless on the growth of the tobacco plants, that is, the injury was only temporary in that case, the plants wilted down but picked up and went on and made good growth.

Cross-examination:

I went to a grey field near the College and got as sandy a soil as I could get in Mecklenburg County; I think it was a rye field, if I remember correctly, I don't know whether that field had ever had cotton in it.

In the analysis, I didn't find any borax, not even a trace, and just a small trace of chlorine and that had no injurious effect. Chlorine that is used in tobacco is the element as is found associated with some constituents that is introduced into the fertilizer that is known to be plant food. Chlorine is one constituent of table salt, sodium is associated with it. I found a trace of chlorine in the fertilizer and I found 8.3 available phosphoric acid and it was branded 8%, and 2.27 potash when it was branded 2% and I found 1.32 ammonia and the bag was branded 2%; the sample I had did not show as much ammonia as the sample sent to the State Department; our analysis was made much later, and that may account for the difference. We used the standard method for determining nitrogen in the presence of nitrates. This injurious substance we never did name. I can't answer your question about the filler in that fertilizer, whether the sweepings from the Reynolds Tobacco Factory would be injurious.

I have been a farmer all my life, since I was old enough to follow the plow. I was raised in West Virginia, and I have never raised tobacco. These experiments were begun on the 15th day of January, we raised our plants, planted the seed sometime in November. The boxes we planted them in were about a foot long, slightly narrower than deep, between 6 and 7 inches deep; in that box we put ten plants, two rows, five in each row; these plants, at the time we put them in the boxes were about two months old, something like 14 inches above the ground; I should say the holes in which the plants were placed would reach about half way down in the box, set in the ground about three inches, leaving between two and three inches beneath the plant; the fertilizer was placed in the row, the rows were made and the fertilizer placed in the row and then the opening was made and the plant put down right down on the fertilizer, to give them every chance, ordinarily the second day they began to show serious effects.

I have never seen a farmer plant tobacco; I don't know that they first make a furrow and then cover that up and then put the plant at least five or six inches from the fertilizer; I am a wheat and corn farmer; I have planted corn in the furrows with the fertilizer with good results, in West Virginia; I followed my brother dropping the fertilizer right on the corn until I was worn out by dinner time.

In my experiments, I had some sort of fertilizer in every box; I had no blank box in the first experiment; in the second I did, the plants lived but there was slight growth, if I told the jury that the plants died, it was certainly a mistake, because I was reading from the notes, and anyone who wants to may read it here that the plants lived, but the growth was slow, what you would naturally expect in soil of that sort.

Redirect examination:

Where I used this fertilizer where the chlorine was removed, the plants lived.

Q. How do you account for that?

Objection by defendant, overruled, exception.

67 A. We used heat in the removal of the chlorine, and of course that affected the fertilizer. All these tests were made looking forward to a garden test; we made the garden tests.

Objection by defendant, overruled, exception.

Began these tests on May 4th; in this experiment there was none of the original samples used, but second samples were sent, supposed to come from this car; we exhausted all the samples except that in those jars there, and we asked for another sample for our garden test.

I have seen beds for tobacco out in March and April in passing through Virginia, but I didn't notice how large the plants were at that time.

These tests were made in a room in the laboratory that had a southern exposure, the conditions as to heat were as good as we could provide, looking forward all the time to the more extensive garden tests. The tests were made in a room free from the fumes that might arise from the chemical laboratories.

Recross-examination:

It was a steam heat; we used our judgment watering the plants, if it was a sun-shiny day they would require more water, we kept the soil as near what my experience as a farmer—would call for the growth of tobacco. We watered them sometimes every day, sometimes every other day, the water was applied with a great deal of care; we used the quantity according to our judgment, probably two tablespoonfuls; there is a great deal of difference in temperature in a room of that sort a cloudy and a sun-shiny day.

Oscar J. Tuttle testified for plaintiff: I am assistant chemist at Davidson College, I studied chemistry all four years at Davidson College, and since that time, I have been following my profession, there. I was present when these experiments were made; I did practically all the analytical work.

The fertilizer I analyzed was sent to us in one of these containers.

Objection by defendant to the evidence of this witness, and all other witnesses on the same subject matter, as set forth in the objection to the evidence of Dr. Arbuckle, overruled, exception.

My analysis of the fertilizer was phosphoric acid (P2O5) 8.23%; Potash (K2O) 2.27%; Nitrogen (N2) 1.10% or Ammonia (NH3) about 1.32%; Chloride about 1%, Sulphate, very large.

These boxes were about 242 cubic inches, I don't remember the exact figures as to dimensions.

Q. From your experience, there with this fertilizer, state whether or not it contained any deleterious substances, injurious to the growth of tobacco?

Mr. Swink: Did you ever grow tobacco?

A. No, sir.

The Court: He can state if he knows.

A. I did.

That substance was removed incidentally in our removing the chlorine when we heated the fertilizer. After this process was complete, the fertilizer was good for tobacco, and was not good for the growth of tobacco before.

Cross-examination:

It was heated to boiling temperature or a little above boiling. Chlorine was removed by the addition of the calculated quantity of chemically pure silver sulphate necessary to combine with the amount of chlorine present, heating and filtering out the precipitate. We found 1.09% of chlorine, 2% is not injurious to plant life. The silver of the silver-sulphate was filtered out in combination with the chloride; the sulphate part remained in the altered fertilizer, and the metals which had been in combination with the chloride were then in combination with the sulphate; I left the additional sulphate in the fertilizer and it went under these plants; when I washed out this chloride, I probably washed out other ingredients.

The potassium chloride would remain as sulphates, and that, as far as I know would be the only appreciable change. The potash had not all disappeared, that is not soluble in water; that was united with the original residue and applied to the plants in proportionate part. We had the proportionate part of the residue and the proportionate part of the solution and the water soluble part of the fertilizer. We put in the box where we carried on the experiments, we put the water. I was there when he planted the plants in the fertilizer; the box had approximately six inches of dirt in it. I didn't bring the exact measurements with me; put the fertilizer in the row, which was about 3 inches deep. I didn't notice that so very carefully, that was Dr. Arbuckle's part of the game and he did that himself. I was a by-stander. He had testified to that part of it; he planted two rows in each box, five plants in a row, the two tablespoons of water a day was only an approximation, as he told you.

We made some fertilizer in the laboratory that was completely soluble in water; we used chemically pure salts from the laboratory and infusorial earth as a filler. I don't know whether there is any of that in Rockingham County or not. I think most of the potash and ammonia in that experiment of the fertilizer made in the laboratory were soluble in water. I did not see the earth gotten that was put in that box. I have never grown tobacco. My home is in Charlotte, now Davidson, I haven't posed as a farmer.

Redirect examination.

The actual samples were used in some of the boxes, and some was used after it stood in the window where the sun hit it and my recollection is, that it did not have the same effect on the tobacco it had before.

Plaintiff rests.

Upon the conclusion of the plaintiff's evidence in this case, the defendant moves for judgment as of non-suit.

The pleadings appear in the record and have been read by the Court, and the evidence of the plaintiff, foregoing, appears in the record.

With the aid that the Court has had in the argument and from a decision of the Court in 181 N. C., 175 and a careful review of the Statutes, as epitomized in the Consolidated Statutes and the Statutes of 1917 Chapter 143, as amended by the Acts of 1919, the Court is of opinion that upon the Complaint and upon the evidence foregoing, the plaintiff has not made out his case, and the
70 motion therefore, of the defendant, upon the whole record, is granted, and it is therefore adjudged accordingly.

To this ruling of the Court, the plaintiff in apt time and in open Court excepts and appeals to the Supreme Court; notice of appeal is waived in open court and appeal bond of $50.00 adjudged sufficient.

By consent appellant is allowed until February 1st, to serve case on appeal, and the defendant is allowed until March 1st to serve counter-case or file exceptions.

Assignments of Error.

The plaintiff makes the following assignments of error:

1. To the action of His Honor in allowing motion of non-suit as set out on page 54 of the record, for that the pleadings of plaintiff were proper and regular and set out a good cause of action; and further, for that the interpretation of the law by His Honor set out on p. 54 of the record is incorrect, it not being the true interpretation of said laws and statute, for that said law was never intended to apply to cases of this character, where deleterious substances were used in the fertilizer in open violation of the criminal part of said statute, and for that, said statute is unconstitutional as it deprives a citizen

of the state from having his right of action for damages suffered for breach of contract, and for the further reason that it puts a burden on the farmer that he cannot comply with, and is class legislation, and is discriminatory, and is in direct violation of the constitutional rights guaranteed to a citizen, by the constitution and laws, both of the State and the United States, and upon the evidence, pleadings, and a proper interpretation of the laws it was error to non-suit the plaintiff.

Respectfully submitted,

J. M. SHARP,
Atty. for Plaintiff.

We hereby accept services of the foregoing case on appeal and acknowledge receipt of copy of same except that it is under-
71 stood that the physical exhibits which cannot be put in printed form are to be presented to the Supreme Court as such physical exhibits, and all written exhibits are to be copied by the Clerk and inserted in the record.

This the 30th day of January, 1922.

GLIDEWELL & MAYBERRY,
Counsel for Defendant.

It is hereby agreed that the foregoing together with the physical exhibits and the records proper to be attached by the Clerk of Superior Court of Rockingham County shall constitute the case on appeal to the Supreme Court, said records to include plaintiff's Exhibit "A" and defendant's Exhibits 1, 2 and 3.

This the 8th day of March, 1922.

J. M. SHARP,
Counsel for Plaintiff.
SWINK & HUTCHEON,
MANLEY, HENDREN & WOMBLE,
GLIDEWELL & MAYBERRY,
Counsel for Defendant

STATE OF NORTH CAROLINA,
County of Rockingham:

In the Superior Court.

I, Hunter K. Penn, Clerk Superior Court in and for the aforesaid State and County, do hereby certify that the foregoing is a true and correct transcript of the record in the suit entitled R. M. Jones v. Union Guano Co., Inc., as the same is taken from and compared with the originals now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed my official seal. Done at Wentworth, N. C., this the 7th day of March, 1922.

[L. S.] HUNTER K. PENN,
Clerk Superior Court Rockingham County.

72 *Docket Entries.*

Transcript of appeal from Superior Court Rockingham County, docketed in Supreme Court of North Carolina, 11 March, 1922. Appeal argued 5 April, 1922. Opinion by Stacy, Justice, affirming judgment of Superior Court of Rockingham County, rendered 19 April, 1922, as following:

73 Supreme Court of North Carolina, Spring Term, 1922.

No. 357.

R. M. JONES

v.

UNION GUANO COMPANY, INC.

Appeal by Plaintiff from Long, J., at November Term, 1921, of Rockingham.

Civil action to recover damages for an alleged breach of warranty in the sale of certain fertilizers; plaintiff alleging that his crop of tobacco was injured by reason of some deleterious or harmful substance contained in the fertilizer sold by the defendant.

At the close of plaintiff's evidence there was a judgment as of nonsuit, from which this appeal is prosecuted.

J. M. Sharp and Fentress & Jerome for plaintiff.
O. O. Efird, Glidewell & Mayberry, Manly, Hendren & Womble and Swink & Hutchins for defendant.

STACY, *J.*:

This is one of nineteen suits brought by resident farmers of Rockingham County against the Union Guano Company for alleged crop damage or shortage occasioned by reason of the use of certain fertilizer manufactured and sold by the defendant. See same case reported in 180 N. C., 349.

The plaintiff in this particular case bought fifty-one sacks of the fertilizer in question, and upon trial, there was evidence tending to show its inferior quality, deficiency of stated ingredients, injury to the crop of tobacco, etc. But his honor dismissed the action and entered judgment as of nonsuit upon the ground that there had been no compliance with Section 4697 of the Consolidated Statutes, with respect to having the fertilizer tested by chemical analysis, as required by said section as a condition precedent to plaintiff's right to maintain this suit. Upon the record, it must be conceded that plaintiff has failed to meet the requirements of the law which clearly provides that no suit for shortage, or damages to crops, resulting

from the use of fertilizers, shall be brought, except after
74 chemical analysis showing deficiency of ingredients, unless the dealer has been selling goods that are outlawed by the statute, or has offered for sale in this State, during the season, dishonest or fraudulent goods. Fertilizer Works v. Aiken, 175 N. C., p. 402.

In order to surmount the barrier and to obviate the difficulty, thus presented, plaintiff attacks this section of the law, relating to agriculture, as unconstitutional and void. He says its provisions are unreasonable and impossible of fulfillment. But we are unable to agree with the plaintiff in this position. The reasons underlying the passage of the statute in question are fully stated with approval and supported by the citation of several authorities in Fertilizer Works v. Aiken, 175 N. C., 398. We need not repeat here what has so recently been said in that opinion. There is nothing in the act which impairs the right of contract and we think it is constitutional. Fertilizing Co. v. Thomas, 181 N. C., 274.

Affirmed.

75 ROCKINGHAM COUNTY:

North Carolina Supreme Court, Spring Term, 1922.

No. 357.

R. M. JONES

vs.

UNION GUANO COMPANY, INC.

Judgment.

This cause came on to be argued upon the transcript of the record from the Superior Court of Rockingham County: upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is, therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable W. P. Stacy, Associate Justice, be certified to the said Superior Court, to the intent that the judgment is affirmed.

And it is considered and adjudged further, that the plaintiff and surety do pay the costs of the appeal in this Court incurred, to-wit, the sum of Thirty-nine 45/100 Dollars ($39.45), and execution issue therefor.

76 Supreme Court of North Carolina.

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a true, correct and perfect copy of the transcript of the Superior Court of Rockingham County and

of the record of this Court in the action lately pending in this Court on appeal from said Superior Court, wherein R. M. Jones is plaintiff and Union Guano Co. (Inc.) is defendant, as appears from originals on file in this Court.

Witness my hand and seal of said Supreme Court of North Carolina at office in Raleigh, this twentieth day of June, 1922.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk Supreme Court of North Carolina.

Endorsed on cover: File No. 29,022. North Carolina Supreme Court. Term No. 472. Richard M. Jones, plaintiff in error, vs. Union Guano Company, Incorporated. Filed July 8th, 1922. File No. 29,022.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 73.

RICHARD M. JONES, PLAINTIFF IN ERROR,

vs.

UNION GUANO COMPANY, INCORPORATED, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF OF DEFENDANT IN ERROR.

LOUIS M. SWINK,
W. M. HENDREN,
Counsel for Defendant in Error.

OSCAR O. EFIRD,
Of Counsel.

(29,022)

SUBJECT INDEX.

Of

TABLE OF CASES CITED

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vs.

UNION GUANO COMPANY, INCORPORATED, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

We do not agree with the statement of the case as presented in the brief of the counsel for the plaintiff in error, and therefore submit the following as the statement of the case.

This is one of nineteen suits from Rockingham County Superior Court of North Carolina brought by a number of

farmers against the Union Guano Company for alleged crop damage sustained by them as a result of the use of 378 bags of 8-2-2 Fish brand fertilizer purchased by them from Jno. R. Williams, a fertilizer dealer. The fertilizer was purchased by Mr. Williams from the defendant and was sold to the farmers at the price of $4.90 per bag, aggregating $1,861.65, and the damages claimed in the suits approximate $60,000.00. The capital stock of the defendant is $75,000.00, as will appear by reference to the certificate of incorporation filed in the office of Hon. W. N. Everett, Secretary of State, and the damages claimed amount to four-fifths of the capital stock of the defendant.

The record discloses that in February, 1919, the members of a local Farmers' Union met at Sadler's schoolhouse, in Rockingham County, North Carolina, to make arrangements to purchase fertilizer for the coming season. They invited Mr. John R. Williams, agent of the Old Buck Guano Company, to be present. Mr. Williams, who had formerly been an agent of the defendant, but at this time was not connected in any way with it, explained at the meeting the relative plant food values of fertilizers. A number of the farmers present at this meeting had used Fish brand 8-2-2 fertilizer in previous years, and they requested Mr. Williams to purchase from the defendant in error this brand of fertilizer instead of the Old Buck Guano Company's fertilizer, for whom he was agent.

In accordance with this request Mr. Williams bought from the defendant in error 378 bags of Fish brand 8-2-2 fertilizer, manufactured by it, at its factory in Winston-Salem, N. C., but on account of his contract relations with the Old Buck Guano Company, which forbade him to sell fertilizers other

than the Old Buck brands, ordered it shipped to his nephew, R. G. Newman, at Reidsville, N. C. The fertilizer was shipped from the factory in Winston-Salem, N. C., on February 25, 1919, and upon receipt of the car at Reidsville, N. C., Mr. Williams had his son deliver the fertilizer to his customers, and Mr. Williams paid the defendant in error for his purchase on March 1, 1919.

The fertilizer was used by the plaintiff in error and other persons on their tobacco crops in the Spring of 1919. The last of August a part of a bag of the fertilizer shipped in the same car with plaintiff in error's was found in Mr. Kemp's corn crib, and another part of a sack was found in a cutting room at Mr. Johnson's feed barn. Each of these bags was not quite full and contained only about 175 pounds. Hugh Johnson opened up the sacks and with his hand drew out two small samples from about the middle of the bags, placed same in boxes or cardboard packages, which he turned over to one of the plaintiffs who carried same to Fred S. Walker, County Demonstrator for Rockingham County. On August 18, 1919—which was some time after the samples had been taken by Mr. Johnson—these samples were mailed by Mr. Walker to the Department of Agriculture at Raleigh, N. C., for analysis. The plaintiff in the present suit was not the owner of either of the sacks from which the alleged samples were taken—it was no part of his purchase and the only connection which these two sacks have with the controversy is that they were shipped in the same car in which plaintiff's fertilizer was shipped. The fertilizer in the corn crib as well as in the cutting room was delivered about March 1st and had been standing out in the weather for five or six months. The evidence both of Mr. Williams (Record, page

25) and the evidence of Dr. Arbuckle (Record, page 47) shows that fertilizer under these conditions will deteriorate considerably.

On September 10, 1919, the North Carolina Department of Agriculture made report of its analysis, which is Exhibit No. 3 (Record, page 17) showing that the sample of fertilizer in question marked 8-2-2 contained the following:

Per cent available Phosphoric acid	7.89
Per cent Nitrogen (equivalent to ammonia)	1.85
Per cent Potash	2.16

and the analysis states further—"*does not contain any boras*" and under the head of remarks, it is stated—"This sample was not taken according to the rules of this department and is not, therefore, a legal sample. The analysis is made for information only."

Notwithstanding the length of time that the fertilizer in question had been standing out in the weather, upon this analysis there was no deficiency for which compensation could be claimed, since section 4695 of the Consolidated Statutes of North Carolina allows a deficiency of 15 per cent or as is familiarly known in the trade 15 points without coming within the condemnation of the statute. C. S. 4695 provides:

> "Any excess of any ingredient above the guarantee shall not be credited to the deficiency of any other ingredient if the deficiency is more than 15 per cent."

While there was a deficiency both as to the phosphoric acid and ammonia, the excess of potash compensated for such apparent deficiency and calculated upon the basic net value of the guaranteed ingredients, according to the table for the

year 1919, of North Carolina Agricultural Department, which is referred to in detail in *Fertilizer Co. v. Thomas*, 181 N. C., 274, 277, there was an excess value of plant food per ton of 60 cents. The claim had evidently been made that the fertilizer contained borax because Dr. Kilgore's report contains the positive statement "does not contain borax" and a copy of this report of the analysis was sent to both Mr. Jones and his counsel, J. M. Sharp.

The plaintiff, desiring another analysis, had Mr. Williams to take samples from these bags. This was after the report of Dr. Kilgore had been received (Record, page 17). The samples were taken this time in practically the same manner as the other samples, except they were this time placed in glass jars. Mr. Williams took the samples to the law office of Mr. J. M. Sharp, attorney for plaintiff in error, and put them down in a corner in the office until Mr. Sharp could find out where they were to be sent. About a week later—in the meanwhile, the jars had been left with the plaintiff in error's counsel in his law office with many people going in and out—the packages were addressed and mailed to Dr. Arbuckle. It is not stated exactly when Dr. Arbuckle made his analysis, but his analysis shows (Record, page 14) the following:

> "The available phosphoric acid 8.3; ammonia 1.32, potash 2.27."

He also stated that he found a trace of chlorine, which was explained by Mr. Thies (Record, page 19) as 1.097, but this is qualified by Mr. Thies with the statement that 2 per cent of chlorine—which in common parlance is the same as ordinary table salt—is not injurious to plant life. Dr. Arbuckle states "I didn't find any borax, not even a trace, and just

a small trace of chlorine, and that had no injurious effect" (Record, page 44).

These chemists, that is—Dr. Arbuckle and Mr. Thies—then proposed to testify as to the results of certain experiments which had been carried on by them in the laboratory at Davidson College to show that by reason of such experiments *and not by chemical analysis*, that the fertilizer contained some deleterious substances which were injurious to the growth of tobacco. The defendant objected to this evidence relying upon the ruling of the court in *Fertilizer Co. v. Thomas*, 181 N. C., 274, 283, where the exclusion of similar evidence of a botanist—Prof. Wolffe—was approved. The evidence of these witnesses, however, appears in the record. The record further shows that the land of the plaintiff was ordinary tobacco land; that it was a very wet season in the year 1919; that July and August were exceedingly wet and a great deal of tobacco was drowned out (Record, page 26), and the warehouseman, Mr. Snead (at Record, page 41), states that other farmers were in the same boat with the plaintiff and that the sales of tobacco on the Reidsville, N. C., market for that year were just about half the number of pounds usually sold.

The crop of the plaintiff was sold on the Reidsville, N. C., market and brought prices ranging from 55 cents to 76 cents per pound, but other tobacco raised from fertilizer shipped in this same car of this same brand brought $1.15 per pound (Record, page 26).

The plaintiff in error brought his suit alleging a compliance with the C. S. 4690-4703. The defendant in error answering, denied that the statute had been complied with and in its further defense pleaded in bar of the action the failure to comply with this statute. At the close of the evi-

dence judgment of non-suit was rendered and the plaintiff in error appealed. Upon appeal the judgment was affirmed by the Supreme Court of North Carolina. The case is now before this court upon writ of error to the Supreme Court of North Carolina bringing into question the constitutionality of the statute under the fourteenth amendment to the United States Constitution.

Brief of the Argument.

I.

The economic conditions of the State of North Carolina with reference to the sale of commercial fertilizer demanded the enactment of the fertilizer act, whose validity is here attacked, by the Legislature in its discretion under its police power.

1. A review of the decisions of the Supreme Court of North Carolina shows the economic necessity for the enactment of the statute.

Reiger *v.* Worth, 130 N. C., 268 (1902).

Carson *v.* Bunting, 154 N. C., 530 (1911).

Fertilizer Works *v.* McLawhorn, 158 N. C., 274 (1912).

Ober *v.* Katzenstein, 160 N. C., 439 (1912).

Tomlinson *v.* Morgan, 160 N. C., 577 (1914).

Guano Co. *v.* Live Stock Co., 168 N. C., 442 (1915).

Carter *v.* McGill, 168 N. C., 507 (1915); S. C., 171 N. C., 775 (1916).

Consolidated Statutes of N. C., Secs. 4690 to 4703, inclusive. (See Appendix to this Brief.)

Fertilizer Works *v.* Aiken, 175 N. C., 393 (1918).

Fertilizer Co. *v.* Thomas, 181 N. C., 274 (1921).

Jones *v.* Guano Co., 183 N. C., 338 (1922).

2. The Supreme Court of the United States will not review the expediency of economic legislation enacted by a state legislature in the exercise of its discretion affecting the general welfare of the state.

Central Lumber Co. *v.* South Dakota, 226 U. S., 157; 57 L. Ed., 164 (1912).

Middleton *v.* Texas Power & L. Co., 249 U. S. 152; 63 L. Ed., 527.

Arizona Copper Co. *v.* Hammer, 250 U. S., 400; 63 L. Ed., 1058.

II.

The statute in question does not deny to the plaintiff in error the equal protection of the law under the 14th Amendment to the Constitution of the United States.

1. Laws having a like application to all similarly situated satisfy the requirements of the equality clause of the 14th Amendment.

Barrett *v.* Indiana, 229 U. S., 26; 57 L. Ed., 1050.

Missouri, etc., R. R. Co. *v.* May, 194 U. S., 267; 41 L. Ed., 971.

2. A reasonable classification based on economic necessity is not a denial of the equal protection of the laws under the 14th Amendment.

Gulf, etc., R. R. Co. *v.* Ellis, 165 U. S., 150; 41 L. Ed., 666.

Williams *v.* Arkansas, 217 U. S., 79; 54 L. Ed., 673.

McGoun *v.* Ill. Trust, etc., Bank, 179 U. S., 283; 42 L. Ed., 1037.

Fidelity Mut. Life Assn. *v.* Mettler, 185 U. S., 308; 46 L. E., 922.

North Western Nat. & L. *v.* Riggs, 203 U. S., 243; 51 L. Ed., 168.

Western U. Tel. Co. *v.* Commercial Mill Co., 218 U. S., 406; 54 L. Ed., 1080.

Seaboard A. L. R. Co. *v.* Seegers, 257 U. S., 73; 52 L. Ed., 108.

Yazoo, etc., R. Co. *v.* Jackson Vinegar Co., 226 U. S., 217; 57 L. Ed., 193.

Noble State Bank *v.* Haskell, 218 U. S., 104; 55 L. Ed., 112.

St. Louis, etc., Co. *v.* Matthews, 165 U. S., 1; 41 L. Ed., 611.

Missouri, etc., R. Co. *v.* May, 194 U. S., 267; 48 L. Ed., 971.

Minn., etc., Oil Co. *v.* Emmons, 149 U. S., 364; 37 L. Ed., 769.

12 *Corpus Juris*, 1160.

III.

The statute in question does not deprive the plaintiff in error of property without due process of law.

1. The plaintiff in error has been deprived of no remedy by the statute.

S. C. of N. C., Sec. 4697. (See Appendix.)

Fertilizer Works *v.* Aiken, 175 N. C., 398.

New York C. R. Co. *v.* White, 243 U. S., 170; 61 L. Ed., 667.

Chicago, etc., R. Co. *v.* Tranbarger, 38 U. S., 67; 58 L. Ed., 1204.

Truax *v.* Corrigan, 257 U. S., 312; 66 L. Ed., 254 (1921).

Middleton *v.* Texas Power & L. Co., 249 U. S., 152; 63 L. Ed., 527 (1918).

2. The prospective feature of the act in question does not deprive the plaintiff in error of a vested right, nor does it make the act objectionable under the 14th Amendment.

Farmers & M. Bank *v.* Federal Reserve Bk., — U. S., —; 67 L. Ed., 737 (1923).

Middleton *v.* Texas Power & L. Co., 249 U. S., 152; 63 L. Ed., 527 (1918).

Young *v.* Duncan, 218 Mass., 246; 106 N. E., 1.

Maekin *v.* Detroit-Timkin Axle Co., 153 N. W. (Mich.), 49.

3. An analysis of the statute, Consolidated Statutes of North Carolina, section 4697, shows that it was enacted under the urgent economic necessity of the State, in accordance with the direct suggestions of the Supreme Court of the State, and that it satisfies every requirement of the Federal Constitution.

(*a*) A party cannot question the constitutionality of a statute until he has brought himself within the alleged unconstitutional feature of the statute.

Rosenthal *v.* New York, 226 U. S., 260; 59 L. Ed., 212.

Jeffreys Mfg. Co. *v.* Blagg, 235 U. S., 571; 57 L. Ed., 364.

Arkadelphia Mill. Co. *v.* St. Louis, etc., R. Co., 249 U. S., 134; 63 L. Ed., 517.

Middleton *v.* Texas, etc., L. Co., 249 U. S., 152.

(*b*) The statute is reasonable, calculated to insure fair samples and analysis of fertilizer.

(*c*) The statute does not make the analysis of the Department of Agriculture conclusive, but only *prima facie* evidence of its contents.

Fertilizer Works *v.* McLawhorn, 158 N. C., 274 (1912).

Carter *v.* McGill, 168 N. C., 507 (1915); S. C., 171 N. C., 775 (1916).

(*d*) The provisos of the statute are reasonable, calculated to protect the honest farmer and the honest manufacturer alike.

Carson *v.* Bunting, 154 N. C., 530 (1911).

Jacobson *v.* Mass., 197 U. S., 11; 49 L. Ed., 643.

Powell *v.* Penn., 127 U. S., 678; 32 L. Ed., 253.

(*e*) The statute does not substitute the arbitrary discretion of an administrative department for a judicial inquiry of the court.

People *v.* Macon County, 19 Ill. App., 264.

State *v.* Powell, 77 Miss., 543; 27 Sou., 927.

Hawkins *v.* Bleakley, 243 U. S., 210; 61 L. Ed., 678 (1916).

Dickson *v.* Perkins, 172 N. C., 259 (1916).

Del Castillo *v.* McConnico, 168 U. S., 674; 42 L. Ed., 622.

C. S. of N. C., Sec. 1694.

(*f*) A reasonable numerical limit is not objectionable under a valid exercise of the police power.

Murphy *v.* California, 225 U. S., 623; 56 L. Ed., 1229.

Barber *v.* Connolly, 113 U. S., 27; 28 L. Ed., 923.

ARGUMENT.

I.

The economic conditions in the State of North Carolina with reference to the sale of commercial fertilizer demanded the enactment of the Fertilizer Act, whose validity is here attacked, by the Legislature in its discretion under its police power.

Within recent years North Carolina has made wonderful progress in agriculture. It has, within the past ten years, emerged from its heretofore unimportant and insignificant standing among its sister States, in the volume and value of its agricultural products, to one of the three or four most important in the Union. This rapid progress and development in such a fundamental industry has caused the State, through its legislative judgment and discretion, to protect, preserve, and encourage this valuable industry to the end that the general welfare of the entire State might be protected. Upon a realization of this economic condition the State, through its Legislature, has sought to safeguard the general welfare of the people of the State and, with that purpose in view, the authority of the State Department of Agriculture has been enlarged to keep abreast with this progress, and innumerable statutes have been passed to preserve, protect, and regulate the agricultural interest of the State.

I. A Review of the Decisions of the Supreme Court of North Carolina Shows the Economic Necessity for the Enactment of the Statute.

The economic policy back of the Legislature in passing the fertilizer act, whose validity is questioned in this case, can best be ascertained by a review of the cases decided in the Supreme Court of North Carolina bearing on questions of agriculture, and more particularly upon the question of commercial fertilizer. The first of these important cases is the case of *Rogers v. Worth*, 130 N. C., 268 (1902), where the plaintiff bought of the defendant 125 bushels of seed rice which was represented to the plaintiff to be good seed rice. The rice failed to sprout after it was properly planted and treated. The plaintiff brought his action to recover damages, alleging that the representations made by the company's agent constituted a warranty that the rice was good seed rice and would germinate if properly planted and cultivated. The court held that the representation amounted to a warranty and allowed a recovery. Under this decision the doctrine was laid down that the purchaser of seed has a cause of action against the seller for the failure of the seed to germinate, resulting in a loss of crop.

This doctrine as laid down in the case of *Rogers v. Worth, supra*, had no application in cases other than those for diminution of crops due to failure of seed to germinate. The court in its decision did not contemplate an extension of the doctrine, nor did it intimate an extension in its dicta.

That commercial fertilizer is used under all commercial crops is so notorious a fact that the courts will take judicial cognizance of it. This is true whether the crop is produced

from seed, from plants, from sets, or from young trees, as in orchards. It is likewise true whether the crop be annual or perennial. Thus the use of commercial fertilizer has a wider field of operation than the sale of seed. An extension of the doctrine of the case of *Reiger v. Worth*, *supra*, to commercial fertilizer would be unwarranted, because that would bring into consideration so many other elements, which would make the diminution purely conjectural. It is just as likely that the diminution may be due to faulty seed, plants, or sets, or any one of many other elements, as it is to the quality of the fertilizer. The Supreme Court of North Carolina realized this, and denied an extension of the doctrine to commercial fertilizer in the first case presenting that question. That was the case of *Carson v. Bunting*, 154 N. C. 530 (1911). In that case the plaintiff sued on three causes of action: (1) For shortage in the quantity and quality of cotton-seed meal purchased from the defendant; (2) for the penalty prescribed in the statute for selling cotton-seed meal without having branded thereon the data required by the statute, and (3) for injuries sustained to the plaintiff's crop by reason of defendant's failure to deliver the quantity and quality of cotton-seed meal as set out in the first cause of action. The court held that the plaintiff could not recover for diminution of crop on account of deficiency of ingredients, but that the measure of damages is the abatement of the price by the difference between the actual and contract value of the fertilizer. Thus the Supreme Court of North Carolina refused flatly to extend the doctrine of *Reiger v. Worth*, *supra*, to the fertilizer cases. Mr. Justice Walker, at page 537, in his concurring opinion in *Carson v. Bunting*, *supra*, in discussing the cause of action under the penalty, in speak-

ing of the economic policy prompting the Legislature to pass the statute, says:

> "When the law, by the act of 1903, declared that cotton-seed meal should be classed with other fertilizers and that the particular articles proposed to be turned into the channels or arteries of commerce should carry with them the badge of their purity, or, more properly speaking, their genuineness, there is no stretch of construction when we say that the then existing provisions of the law intended to safeguard the farmer against fraud and deceit in the same of such commodities, so essential, not only to his, but to the general welfare should be extended to such a case."

And, on page 541, on concluding he says:

> "My apology, if one is needed, for a discussion of this subject must be found in its great importance to the public, for whose benefit and protection these statutes were passed."

The point was again presented to the North Carolina Supreme Court in the case of *Fertilizer Works v. McLauchorn*, 158 N. C., 274 (1912). In this case the plaintiff sought to recover damages for alleged shortage in his crop on account of deficiency of ingredients in commercial fertilizer sold to him. The fertilizer was analyzed by the Agricultural Department and a small deficiency in quantity was found. An abatement of the price was allowed for the deficiency. The Court held, following *Carson v. Bunting*, *supra*, that the only measure of damages was the abatement of the price. Chief Justice Clark, in discussing the admissibility of evidence as to how the plaintiff's crops looked as compared with his neighbors, said, at page 276:

> "This is essentially the same point as one above discussed. To consider the variety of soil and attendant circumstances, would be purely speculative, the only pertinency of this evidence would be the inference that the ingredients were not as represented. This would be too remote, dependent upon the nature of soil, weather, cultivation, and the like. The best evidence is the analysis by the Agricultural Department."

In this case we find the Supreme Court of North Carolina laying down the rule in the absence of statute as to the rule of evidence in this class of cases. The last two cases were cited with approval in *Ober v. Katzenstein*, 160 N. C., 429 (1912).

The next case in which the question was presented to the North Carolina Supreme Court was the case of *Tomlinson v. Morgan*, 166 N. C., 577 (1914). That was an action by the fertilizer dealer against the purchaser to recover the contract price of certain fertilizer sold to the defendant, and to foreclose a chattel mortgage given to secure the debt. The defendant set up a counterclaim that the fertilizer was represented to him to be high-grade fertilizer especially suitable for tobacco; that he used good plants, and they were properly cultivated, and that there was a marked diminution of his crop. Upon issues submitted to the jury the facts alleged in the counterclaim were established. A judgment was rendered for the debt less the amount of the counterclaim. The court, still attempting to support its former decisions in its language, departed from them in its holding and held that there was no error. The case of *Carson v. Bunting*, *supra*, and *Fertilizer Company v. McLauchorn*

supra, are referred to in the opinion as correctly decided, but the principle of these cases is not followed. Mr. Justice Hoke, in writing the opinion, uses the following language, on page 560:

> "Undoubtedly, a counterclaim of this character presents such an inviting field for litigation and is so liable to abuse that it should not be entertained unless it is clearly established that there has been a definite breach of the warranty, and satisfactory evidence is offered that the loss claimed is directly attributable to the breach, and the amount to be ascertained with a reasonable degree of certainty."

The opinion does not show how much was demanded in the counterclaim. It may be noted, however, that the amount of the debt was $271.55, while the amount of the counterclaim allowed was $187.50 and it may be suggested that the $187.50 was deducted as a recoupment or abatement of the purchase price on account of the deficiency of ingredients. At any rate, the opinion does not show that the defendant was demanding an affirmative judgment on the counterclaim out of all proportion to the purchase price of the fertilizer, and we submit that the case is not authority for such a proposition.

The case of *Guano Company v. [illegible]*, 163 N. C., 442 (1915), followed the next year. In this case the plaintiff sued on certain notes given for the purchase price of fertilizer. The fertilizer was sold under a contract guaranteeing it as to analysis, but not as to results from use. The defendant counterclaimed that it had sold the fertilizer to its customers under warranties that it was suitable for fertiliza-

tion of the crops for which it was recommended, and that its customers had complained that it was not suitable, and that it did not measure up to standard and quality. The verdict of the jury sustained the counterclaim. Upon appeal the Supreme Court of North Carolina reversed the judgment of the lower court on the counterclaim. Mr. Justice Walker, in writing the opinion, said, at page 448:

> "The warranty was drawn for the very purpose of preventing the recovery of such damages as are, in their nature, very speculative, if not imaginary, and out of all proportion to the amount of money or price received by the seller for the fertilizer. If the fertilizer companies can be mulcted in damages for the failure of the crop of every farmer who may buy from them, they may very soon be driven into insolvency or be compelled to withdraw from the State, as the aggregate damages, if the supposed doctrine be carried to its logical conclusion, would be ruinous, and the farmers in the end would suffer incalculable harm. In view, then, of the probable results flowing from such a construction of the contract, we should hesitate very long before adopting it, with its disastrous consequences to both parties, which we cannot suppose they contemplated."

The language of this case indicates that the court has realized the inevitable result of their decision in *Tomlinson v. Morgan*, *supra*, and shows further a retraction of the doctrine there laid down.

The case of *Carter v. McGill*, 168 N. C., 507 (1915), was decided at the same term. The plaintiff sued on notes given for the purchase price of fertilizer. The defendant counterclaimed for a breach of warranty that the fertilizer contained

chemical ingredients resulting in loss and diminution of crops. The defendant offered to prove what was the result of the use of this same kind of fertilizer on the crops of his neighbors. The court held that the evidence is admissible provided a proper foundation is first laid for the same by showing that the land was adapted to the growth of the product—that it had been properly cultivated and tilled, with propitious weather or seasons, so as to exclude any element which would render the evidence uncertain as to the cause of the loss or diminution of the crop, or rid it of its speculative character. Mr. Justice Walker, in writing the opinion, made this observation, at page 510:

> "The seller and the buyer of fertilizers can protect themselves by warranties, at the time of the purchase, if they see fit to do so. The seller may restrict it, while the buyer may require that it be enlarged, according as their interests may dictate. Unless they do so, they must abide by the contract as made by them."

In the same case, on a petition to rehear, 171 N. C. 775 (1916), in a *per curiam* decision the observation was made, on page 776:

> "It is proper, in this connection, to suggest that the plaintiff, and others in the fertilizer trade similarly situated, can protect themselves against too great a hazard in respect to the loss of crops by a provision in their contracts to the effect that they are not to be liable for any results from the use of the fertilizer, or for any loss of crops, as was done in the case of the contract which was the subject of the controversy between the parties in *Guano Co. v. Livestock Co.*, 168 N. C. 442, where we held such a stipulation to be valid."

The vast importance of the sale and purchase of commercial fertilizer to the economic life of the State, with its then existing evils, as shown and illustrated in the foregoing cases, caused the Legislature of the State to take a hand in the matter, and, guided by the suggestions from the State's highest judiciary, it enacted into a statute the accumulations of past experience, seeking thereby to obviate these manifest and existing evils. This statute was passed in 1917 and is known as the Fertilizer Act. It is to be found in *Public Laws of North Carolina* 1917, chapter [illegible], as amended was incorporated into the *Consolidated Statutes of North Carolina* as [illegible] section [illegible], inclusive. In the convenience of the profit and for the further purpose the statute can best be understood and appreciated as to its parts, we have put the [illegible] in the appendix to this brief. At this point we would [illegible] designed to shield its [illegible] but whether [illegible] Provision is made to prevent [illegible] dishonest and fraudulent [illegible] brands and stencil requirements, [illegible] note, going to the extent of [illegible] for violations of the act [illegible] is made in 1697, which [illegible] and the validity of which [illegible] tion, to protect the honest [illegible] and spurious and [illegible] honest farmers and [illegible]

An examination of the [illegible] ment of the act will also be helpful [illegible] economic necessity for the act. [illegible]

the act was *Fertilizer Works v. Allen*, 175 N. C., 398 (1918). The plaintiff sued on a promissory note given to it by the defendant for the purchase price of fertilizer. The note provided a waiver by the purchaser of all claims except that for the "commercial value of the deficiency" from the analysis standard, and this only "when ascertained and determined by the State chemist from samples taken from [the fertilizer] sold and in the presence of the seller or his [duly authorized] agent." The defendant counterclaimed for damages of [illegible]. The court held that under this note the defendant was precluded from recovery on his counterclaim. Mr. Justice Hoke, in writing the opinion, says, at page 400:

> We are of the opinion that such a stipulation is [illegible] a reasonable one, well calculated to protect [illegible] and safe dealing in this important matter, and not only not opposed to any public policy touching with us but the same is in accord with [illegible] suggestion of this court in *Carter v. [illegible]*, [illegible] fully recognized and approved [illegible] legislation on the subject. Laws 1917, ch. [illegible].
>
> The statute in question, repealing sections 3945 to 3959 of Revisal, inclusive, makes elaborate and [illegible] with the view of insuring a correct analysis of these important commodities and to protect both of the manufacturer and vendor and of the purchaser and consumer, directs the employment of sufficient chemists and assistants, provides for an analysis at the instance of the purchaser or by its own agents, when necessary, provides, further, that samples for the purpose shall be taken always in the presence of the agent, seller or dealer, or some

representative of the manufacturers or if none of these can be present or if they refuse to act, then in the presence of two disinterested witnesses, etc., that no suit for damages shall be brought for results in use except after chemical analysis showing deficiency of ingredients unless the dealer has been selling goods that are outlawed by the statute or has offered for sale during the season dishonest or fraudulent goods.

"Having thus dealt very fully with the subject, recognizing as sound the principle of selecting the samples in the presence of the manufacturer or dealer, section 7 of the act concludes with the proviso that 'nothing in this act shall impair the right of contract,' showing the clear intent and purpose of the Legislature to allow either party the privilege of making further stipulations in reasonable protection of their interests and in accord with established principles of law. In *McLawhorn v. Fertilizer Works*, 158 N. C., 274, opinion by the Chief Justice, decided intimation is given that this is the true public policy and correct interpretation of our former statutes on the subject and undoubtedly it should prevail under the present law.

"We must all recognize that in these sales of commercial fertilizers, among the most important of our economic life, some such provision as this is essential and necessary to the proper protection of the manufacturer and dealer on the one side and purchaser and consumer on the other, and required to enable them to have any correct estimate of the pecuniary value of such contracts, and the defendant, under a valid agreement, having waived his right to any and all claims for damages except for deficiency in ingredients and then only when such deficiency is ascertained in a specified way, and there being no allegation of claim that the required measures were

taken to have a fair analysis made, we must hold that no valid defense has been alleged and, on that ground, the demurrer of the plaintiff has been properly sustained."

The next case was *Fertilizer Company v. Thomas*, 181 N. C., 274 (1921). The plaintiff sued for the price of fertilizer sold to the defendant. The defendant pleaded that the fertilizer was worthless, and set up a counterclaim for loss of crop, due to deleterious substance in the fertilizer. An analysis was made by the State Agricultural Department which showed more than the guaranteed plant food value and the absence of deleterious substance. Other evidence as to injurious effect on the crop was excluded. The court, after reviewing the conditions which led to the enactment of the statute, upheld its validity and held that the evidence was properly excluded.

At this point we wish to mention the fact that about February 9, 1921, two bills, one known as House Bill No. 467 and the other known as Senate Bill No. 1117, were presented to the Legislature of North Carolina through the influence of persons interested in the outcome of this litigation for the purpose of having the Fertilizer Act of 1917 repealed, and upon the failure of that bill the second was to have it materially amended. Hearings were had before the committees of the Legislature, but the Legislature, in its wise judgment, did not see fit to repeal or amend such an important statute. See Journal of the House of Representatives of North Carolina, volume I, pages 161, 170, 186; also Journal of the Senate of North Carolina, volume I page 468.

The next case is the case now before the court, *Jones v. Guano Company*, 183 N. C., 338 (1922).

Thus from these decisions we get a clear insight into the background of this statute, the evils that were presented and threatening the economic life of the State, the suggestions of the judiciary of the State which would remedy these evils and the enactment of these suggestions into the Fertilizer Act, *Laws 1915, chapter 156*.

2. THE SUPREME COURT OF THE UNITED STATES WILL NOT REVIEW THE EXPEDIENCY OF ECONOMIC LEGISLATION ENACTED BY A STATE LEGISLATURE IN THE EXERCISE OF ITS DISCRETION AFFECTING THE GENERAL WELFARE OF THE STATE.

The economic conditions of a State are under the control of the State Legislature. This is one of the four well-defined classes of the police power—the general welfare of the State. The control of the general welfare of a State is not delegated to the Federal Government by the United States Constitution, and therefore reserved to the State. The Supreme Court of the United States will not examine into the wisdom of the State statutes in controlling the economic affairs of the State under an exercise of its discretion. It is for the State Legislature to say how they will control their economics so as to best serve the general welfare of the State.

Central Lumber Company v. South Dak., 226 U. S. 157, 57 L. Ed. 164, (1912).

In this case, which is the leading case on the subject, Mr. Justice Holmes, in delivering the opinion, says at page 160:

> "If a class is deemed to present a conspicuous example of what the Legislature seeks to prevent, the

14th Amendment allows it to be dealt with, although otherwise and merely logically not distinguishable from others not embraced in the law. Carroll *v.* Greenwich Ins. Co., 199 U. S., 401, 411; 50 L. Ed. 246, 250; 26 Sup. Ct. Rep., 66. We must assume that the Legislature of South Dakota considered that people selling in two places made the prohibited use of their opportunities, and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the Legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the Legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their State, and that there was no other cause of frequent occurrence where the same could be said, we cannot review their economies or their facts. That the law embodies a wide spread conviction appears from the decisions in other States. State *v.* Drayton, 82 Neb., 254; 23 L. R. A. (N. S.), 1287; 130 Am. St. Rep., 671; 17 N. W., 768; State *ex rel.* Young *v.* Standard Oil Co., 111 Minn., 85; 126 N. W., 527; State *v.* Fairmont Creamery Co., 153 Ia., 702; 42 L. R. A. (N. S.), 821; 133 N. W., 895; State *v.* Bridgeman, etc., Ry. Co., 117 Minn., 186; 134 N. W., 496."

Mr. Justice Pitney, in delivering the opinion in *Middleton v. Texas Power & L. Co.*, 249 U. S., 152; 63 L. Ed., 527, at page 157, says:

"There is a strong presumption that the Legislature understands and correctly appreciates the needs

> of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds."

And Mr. Justice Pitney again said, in delivering the opinion in *Arizona Copper Co. v. Hammer*, 250 U. S., 400; 63 L. Ed. 1058, at page 419:

> "The States are left with a wide range of legislative discretion, notwithstanding the provisions of the 14th Amendment; and their conclusions respecting the wisdom of their legislative acts are not reviewable by the Courts."

The economic situation in North Carolina is quite similar to that discussed by Mr. Justice Holmes. Under the decisions in North Carolina, it was realized that the fertilizer companies were subjected to innumerable spurious suits for crop failures; that if the fertilizer companies were to be muleted in damages by every farmer who had a crop failure that it would be the ruination of the small independent fertilizer dealers, driving them out of business and leaving the farmers at the mercy of the fertilizer trusts, or else the fertilizer companies would have to load their prices sufficiently to take care of these spurious suits, and this would be the ruination of the honest farmers who were not disposed to bring spurious suits. The fertilizer companies are just as essential to the farmers as the farmers are to the fertilizer companies and both are essential to the general welfare of the State. By protecting the interest of both the fertilizer companies and the farmers the general welfare of this great agricultural State is likewise protected.

The foresight of the Supreme Court of North Carolina with respect to the result of the unregulated and unrestricted rights of purchaser and seller of fertilizer, and the wisdom of the Legislature in giving heed to the suggestion of that court in the adoption of the Fertilizer Act is strikingly illustrated by facts disclosed on this record.

> As the result of a shipment of fertilizer amounting in dollars and cents to $1,861.65 to the agent of a group of farmers in Rockingham County, N. C., there have arisen 19 suits against the defendant in error for alleged diminution of crops wherein the aggregate damages claimed approximate $60,000.00, which is four-fifths of the capital stock of the defendant in error. This indicates that one single shipment wherein the profit could only be a few hundred dollars may jeopardize and involve the financial life of the manufacturer and seller of fertilizer.

II.

The statute in question does not deny to the plaintiff in error the equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.

1. LAWS WHICH HAVE A LIKE APPLICATION TO ALL SIMILARLY SITUATED SATISFY THE REQUIREMENTS OF THE EQUALITY CLAUSE OF THE FOURTEENTH AMENDMENT.

The equality clause of the Fourteenth Amendment does not deprive the States of their power—i. e., police power—to pass laws for the protection of the public and the promotion of the general welfare. As in other matters, the Legislature

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has a wide discretion in the enactment of such laws, and in pursuance of objects within the scope of its powers may enact laws of limited or particular application as far as the persons or property affected are concerned. Such statutes are valid so long as they apply equally and uniformly to all persons similarly situated. As was said by Mr. Justice Day in Barrett *v.* Indiana, 229 U. S., 26, 29; 57 L. Ed., 1050:

> "The equal protection of the laws requires laws of like application to all similarly situated, but in selecting some classes and leaving out others the Legislature, while it keeps within this principle, is, and may be allowed wide discretion."

And as was said by Mr. Justice Holmes in Missouri, etc., R. Co. *v.* May, 194 U. S., 267, 269; 48 L. Ed., 971:

> "When a State Legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched."

2. A REASONABLE CLASSIFICATION BASED ON ECONOMIC NECESSITY IS NOT A DENIAL OF THE EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT.

Counsel for the plaintiff in error argue in their brief that the statute in question denies the plaintiff in error the equal protection of the law as guaranteed under the Fourteenth Amendment because there is a classification of manufacturer and user of fertilizer as distinguished from other commodi-

ties. This we deny, and respectfully submit that the authorities do not support their contention; especially is this true when there is a public economic necessity for such classification. It is not unlawful to classify business and to provide different rules for different classes. A State may, in the exercise of its police power and without denial of equal protection of the laws, prescribe reasonable regulations for the conduct of business; it may even prohibit altogether persons engaging within its jurisdiction in occupations or businesses that are detrimental to the public welfare. A statute does not constitute a denial of the equal protection of the laws merely because it extends to some persons privileges denied to others or imposes restrictions or liabilities on some, but not on others.

Gulf, etc., R. Co. v. Ellis, 165 U. S., 150; 41 L. Ed., 666.

Such a classification does not render legislation void where it is based on real differences in the subject-matter and is reasonable in extent. The Legislature has a large measure of discretion in making such classifications, and a statute will not be declared void where it does not clearly appear that the enacting body has exceeded its powers.

Williams v. Arkansas, 217 U. S., 79; 54 L. Ed., 673.

The classification in the instant case was made by the Legislature in the exercise of its discretion under its police power and is reasonable. It was required by the economic facts as set out in first part of this brief. In the nature of things it is the only classification that could be made when the entire purpose of the Legislature was to regulate the sale and pur-

chase of commercial fertilizers. If the plaintiff in error's contention be true, then the State Legislature can never pass an act to regulate the sale and purchase of fertilizers without violating the Federal Constitution.

It is well settled that a particular relationship between individuals may furnish legal basis for a classification which satisfies the requirement of the Fourteenth Amendment. In this respect Mr. Justice McKenna, in *McGoun v. Illinois Trust & Savings Bank*, 170 U. S., 283, 293; 42 L. Ed., 1037, 1042, said:

> "The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations."

To the same effect see the following cases where—

> In *Fidelity Mut. Life Asso. v. Mettler*, 185 U. S., 308; 46 L. Ed., 922; 22 Sup. Ct. Rep., 662, and *North Western Nat. L. Ins. Co. v. Riggs*, 203 U. S., 243; 51 Law Ed., 168; 27 Sup. Ct. Rep., 126; 7 Ann. Cas. 1104, the relation of insurer and insured was made the subject of regulation; in *Western U. Teleg. Co. v. Commercial Mill. Co.*, 218 U. S., 406; 54 L. Ed., 1088; 36 L. R. A. (N. S.), 220; 31 Sup. Ct. Rep., 59; 21 Ann. Cas., 815; *S. A. L. R. Co. v. Seegers*, 207 U. S., 73; 52 L. Ed., 108; 22 Sup. Ct. Rep., 28; *Yazoo & M. Valley R. Co. v. Jackson Vinegar Co.*, 226 U. S., 217; 57 L. Ed., 193; 33 Sup. Ct. Rep., 40, that of public utility and patron; in *Noble State Bank v. Haskell*, 219 U. S., 104; 55 L. Ed., 112; 32 L. R. A. (N. S.), 1062; 31 Sup. Ct. Rep., 186; Ann. Cas.

1912A, 487, that of banker of depositor; in *St. Louis & S. F. R. Co. v. Matthews*, 165 U. S., 1; 41 L. Ed., 611; 17 Sup. Ct. Rep., 243; *Missouri, K. & T. R. Co. v. May*, 194 U. S., 267; 48 L. Ed., 971; 24 Sup. Ct. Rep., 638, and *Minneapolis & St. L. R. Co. v. Emmons*, 149 U. S., 364; 37 L. Ed., 769; 13 Sup. Ct. Rep., 870, that of railway and adjoining owner.

We do not wish to unduly laden this brief with the many citations on this subject, but wish to cite 12 *Corpus Juris*, 1160, where there is an enumeration of the particular classifications that have been upheld with citations of all the authorities. Under these authorities we submit that there is no evil in classification when it has a real foundation back of it based upon economic necessity.

III.

The statute in question does not deprive the plaintiff in error of property without due process of law.

1. THE PLAINTIFF IN ERROR HAS BEEN DEPRIVED OF NO REMEDY BY THE STATUTE.

The plaintiff in error argues in his brief that the statute has abolished his remedy for loss of crops due to the harmful effect of fertilizer on the same. This is not the correct effect of the statute. The statute, *Consolidated Statutes of North Carolina*, section 4697, says: "* * * Nothing in this article shall impair the right of contract." Thus the statute neither regulates nor restricts the remedy of the plaintiff in error, but merely requires the purchaser to elect between the full common-law rights and remedies, and the restricted and regulated rights under the statute.

Fertilizer Works v. Aiken, 175 N. C., 398.

The plaintiff in error's cause of action did not arise, if one did arise, which we deny, until 1919, which was after the enactment of the statute. The plaintiff in error argues that the common-law rules have been changed so as to deprive him of his remedy. If this be true, which we deny, the plaintiff in error has no vested right in a rule of the common law, and a changing of such a rule, without more, does not violate any part of the Federal Constitution.

> *New York C. R. Co. v. White*, 243 U. S., 188, 198; 61 L. Ed., 667, 672.
>
> *Chicago & A. R. Co. v. Tranbarger*, 238 U. S., 67, 75; 59 L. Ed., 1204, 1210.

But in the instant case, if any of the plaintiff in error's rights and remedies have been abrogated, it was done by his own voluntary act—by his own election to buy the fertilizer under the statute rather than make a special contract on whatsoever terms he might obtain. The statute provides that he can make such a contract and reserve to himself by that contract any or all of his common-law rights and remedies, or may even enlarge them. When he has by his own volition and election made a contract to buy fertilizer under the terms of the statute, how can he now be heard to complain of the very term of his own contract? The North Carolina Supreme Court upheld as valid a special contract which was substantially the same as the statute in *Fertilizer Works v. Aiken*, 175 N. C., 398 (1918).

On this point, that the plaintiff in error had an opportunity to avail himself of his common-law rights and remedies and did not do so, but, on the contrary, elected to buy under the terms of the statute, the case at bar is distinguish-

able from the case of *Truax v. Corrigan*, 257 U. S., 312; 66 L. Ed., 254 (1921), so much cited and relied upon by counsel for the plaintiff in error in his brief. The distinction is so clear that it does not require the citation of authority to support it, as was observed by Chief Justice Taft in his opinion, where he said, on page 329:

> "The broad distinction between one's right to protection against a direct injury to one's fundamental property right by another, who has no special relation to him, and one's liability to another with whom he establishes a voluntary relation under a statute, is manifest upon its statement."

The many workmen's compensation acts coming before the United States Supreme Court on a test of their constitutionality under the Fourteenth Amendment have been upheld on this very principle. Mr. Justice Pitney, in the case of *Middleton v. Texas Power & L. Co.*, 249 U. S., 152; 63 L. Ed., 527 (1918), says, on page 160:

> "In recent years many of the States have passed elective workmen's compensation laws not differing essentially from the one here in question, and they have been sustained by well-considered opinions of State courts of last report against attacks upon all kinds of constitutional objections, including alleged denial of the equal protection of the laws; usually, however, from the standpoint of the employer."

A large number of cases are cited to support the contention, and the entire reason of the case is based on the elective feature of the statute.

2. The Prospective Feature of the Act in Question Does Not Deprive the Plaintiff in Error of a Vested Right, Nor Does it Make the Act Objectionable under the Fourteenth Amendment.

As has been pointed out above no one has a vested right in a rule of the common law. The purchase of fertilizer was after the enactment of the statute, and the plaintiff elected to come under the act by not making a special contract for the purchase of the fertilizer, as he was allowed to do under the statute. The effect of the statute is prospective rather than retrospective, and ignorance of its terms on the part of the plaintiff in error cannot be urged to relieve him of the effect of his contract. There is no constitutional objection to the elective feature of the statute. The statement of the rule of law applicable is well illustrated in *Farmers & M. Bank v. Federal Reserve Bank*, — U. S., —; 67 L. Ed., 737, decided June 11, 1923, and is well expressed by Mr. Justice Brandeis where he says, with reference to the "par-clearance act," which made an election analogous to the one at bar:

> "It merely provides that, unless the depositor, in drawing the check, specifies on its face to the contrary, he shall be deemed to have assented to payment by such a draft. There is nothing in the Federal Constitution which prohibits the depositor from consenting, when he draws a check, that payment may be made by a draft. And, as the statute is prospective in its operation (Denny *v.* Bennett, 128 U. S., 489; 32 L. Ed., 491; 9 Sup. Ct. Rep., 134; Abilene Nat. Bank *v.* Dolley, 228 U. S., 1, 5; 57 L. Ed., 707, 709; 33 Sup. Ct. Rep., 409), there is no constitutional obstacle to a State's providing that, in the absence of dissent, consent shall be presumed. Laws which subsist at the

> time and place of making a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which effect its construction and those which effect its enforcement or discharge. See Ogden *v.* Saunders, 12 Wheat., 213, 231; 6 L. Ed., 606, 611; Von Hoffman *v.* Quincy, 4 Wall., 535, 550; 18 L. Ed., 403, 408."

The same principle was applied to the optional workmen's compensation act in Middleton *v.* Texas Power & L. Co., 249 U. S., 152; 63 L. Ed., 527 (1918), where Mr. Justice Pitney, in writing the opinion, said, at page 160:

> "That the acceptance of such a system may be made optional is too plain for question, and it necessarily follows that differences arising from the fact that all of those to whom the option is given do not accept it must be regarded as the natural and inevitable results of a free choice, and not a legislative discrimination. They stand upon the same fundamental basis as other differences in the conditions of employment arising from the variant exercise by employers and employees of the right to agree upon the terms of employment."

A very able statement of the principle is found in *Young v. Duncan*, 218 Mass., 346; 106 N. E., 1, where the court says, with reference to the constitutionality of a workmen's compensation act:

> "The section in question affects no existing property right. It deals with no property right after it has come into being. It affects a situation which antedates any property right arising out of tort. It

simply establishes a status between subscribers under the act and their employees in the absence of express action by the latter manifesting a desire to elect a different status. No complaint justly can be made that the section compells the employee to elect without sufficient knowledge. Ignorance of the law commonly is no excuse for conduct or failure to act. The employee is not required to act without inquiry as to the fact of insurance by the employer. He has only to ask for information. There is nothing more than is required in most of the affairs of life in order that one may act intelligently. Knowledge as to interstate commerce rates may be inaccessible without very considerable inquiry, and yet the shippers or passengers may be bound by them although ignorant of their terms (citing numerous cases). * * * The possibility that the employee in a given instance may not know all his rights does not affect the constitutional aspects of the law. Many crimes even are made to depend solely upon the doing of an act with the utmost moral innocence and in ignorance of any forbidding aspect of the act. *Com. v. Mixer*, 207 Mass. 141; 93 N. E., 249; 31 L. R. A. (N. S.), 167; 20 Ann. Cas., 1152."

This is quoted with approval in *Mackin v. Detroit-Timkin Axle Co.*, 153 N. W. (Mich.), 19.

These authorities show clearly that there is no constitutional objection to the elective feature of the statute, and clearly distinguish the case at bar from *Truax v. Corrigan, supra*, on that ground. To require the purchaser of fertilizer to elect as to whether he shall buy it under the statute or by a special contract with the manufacturer is not unreasonable, but we respectfully submit that it is the least that

could be required of the purchaser on account of the vast importance of the fertilizer business to the agricultural interests of the state.

3. AN ANALYSIS OF THE STATUTE, CONSOLIDATED STATUTES OF NORTH CAROLINA, SECTION 4697, SHOWS THAT IT WAS ENACTED UNDER THE URGENT ECONOMIC NECESSITY OF THE STATE, IN ACCORDANCE WITH THE DIRECT SUGGESTIONS OF THE SUPREME COURT OF THE STATE, AND THAT IT SATISFIES EVERY REQUIREMENT OF THE FEDERAL CONSTITUTION.

The first paragraph of the statute provides that the Department of Agriculture shall have power to collect samples of fertilizer and fertilizer material and have them analyzed; that such samples shall be taken from at least 10 per cent of the lot, provided no sample shall be taken from less than ten bags of any one lot or brand. It cannot be urged, and we do not understand that the plaintiff in error urges, that giving to the Department of Agriculture the authority to take and analyze samples is objectionable.

(a) *A party cannot question the constitutionality of a statute until he has brought himself within the alleged unconstitutional feature of the statute.*

The plaintiff in error argues that the statute is unconstitutional because it provides that no sample shall be taken from less than ten bags of any one lot or brand. It is sufficient to say that the plaintiff in error cannot object to that feature of the act, because he bought more than ten bags. The plaintiff in error testifies (Record, page 18) that he bought fifty-one bags of this brand of fertilizer. To object to a statute on the ground that it is unconstitutional the

party must bring himself within the class affected by that feature of the act, and this the plaintiff in error cannot do, because he bought fifty-one bags. The rule is well settled that before one can be heard to oppose State legislation upon the ground of its repugnancy to the Federal Constitution he must bring himself within the class affected by the alleged unconstitutional feature.

Rosenthal v. New York, 226 U. S., 260, 270, 271; 57 L. Ed., 212, 216, 217; Ann. Cas. 1914B, 71.

Jeffrey Mfg. Co. v. Blagg, 235 U. S., 571, 576; 59 L. Ed., 364, 368.

Arkadelphia Mill Co. v. St. Louis, etc., R. Co., 249 U. S., 134, 149; 63 L. Ed., 517, 526.

Middle v. Texas, etc., Light Co., 249 U. S., 152, 156, 157.

(b) The statute is reasonably calculated to insure fair samples and analysis of fertilizer.

The next two paragraphs of the statute provide for the taking of samples; that the samples may be taken in the presence of representatives of the manufacturer and purchaser, or in the presence of three disinterested freeholders. These provisions are reasonable and are calculated to secure a fair sample free from suspicion. The statute, in the third paragraph, further provides that the samples shall be taken with the same kind of instrument as used by the Department of Agriculture. This instrument is a long, hollow, sword-like instrument that may be stuck into a bag which is thirty-one inches in height and thereby secure a sample from the bottom, middle, and top of the bag. It is common knowledge that in the mixing and handling of fertilizer the heavier

chemical elements will naturally work to the bottom of the bag while the lighter ones will come to the top. The method prescribed in the statute is solely for the purpose of securing a fair sample and is certainly reasonable in this respect. There are other provisions in the statute, which is copied in the appendix to this Brief, providing for the mixing, sealing, labeling, etc., of the samples which are likewise reasonable to insure a fair sample.

The fourth paragraph of the statute provides that the Department of Agriculture may make additional rules for taking samples, provided that no sample shall be taken except within thirty days after actual delivery except by the State fertilizer inspector. The proviso is likewise reasonable to insure a fair sample and to avoid the taking of samples after certain chemical elements of the fertilizer have evaporated or undergone a change. Common knowledge shows us that certain of these elements will evaporate when exposed to the weather. The evidence of Mr. Williams (Record, page 25) and Dr. Arbuckle (Record, page 47) also shows this to be a fact.

(c) *The statute does not make the analysis of the Department of Agriculture conclusive, but only prima facie evidence of its contents.*

The fifth paragraph of the statute is the one which is seriously questioned by the plaintiff in error. This provides that the analysis of the State chemist, made under the safeguards outlined above, shall be *prima facie* proof that the fertilizer was of the value and constituency shown by his said analysis. Nowhere in the statute is it provided that the chemical analysis shall be conclusive, as is argued by

the counsel for the plaintiff in error, nor does the statute justify such an inference. This portion of the statute was adopted by the legislature on account of the urgent economic necessity shown in the first part of this brief and at the suggestion of the Supreme Court of North Carolina in the case of *Fertilizer Works v. McLauchorn*, 158 N. C., 274 (1912). This decision shows the cumulative experience of the State culminating in a judicial utterance to that effect. The Legislature made the chemical analysis only *prima facie* evidence of its contents so as to leave open to any plaintiff in a similar action the availability of the rule of evidence as laid down in the case of Carter *v.* McGill, 168 N. C., 507 (1915); S. C., 171 N. C., 775 (1916). The cases cited by the counsel for plaintiff in error do not support a conclusion that a statute making a thing prima facie evidence of a fact violates any Federal constitutional guarantee. The statement of the rule that *prima facie* evidence may be rebutted, and that the same is not conclusive, is so elemental that it does not need the citation of authority to support it.

(*d*) ***The provisos of the statute are reasonably calculated to protect the honest farmer and the honest manufacturer alike.***

The proviso of the fifth paragraph is vigorously attacked. This proviso is that no suit for damages for results of use of fertilizer may be brought (1) except after chemical analysis showing deficiency of ingredients. Attention is directed to the precise language of the statute. The analysis is not limited to the State chemist, and the statute was not so applied in this case, for, by reference to the record, it will be seen that the testimony of Dr. Arbuckle, the professor of

chemistry at Davidson College, N. C., was offered and received in evidence. This provision is to take care of cases like the counsel for the plaintiff in error denominates his second cause of action. The common-law rule in North Carolina, as laid down in the case of *Carson v. Bunting*, 154 N. C., 530 (1911), limits the plaintiff in error in his damages to the difference in the value of the fertilizer; or, (2) unless it shall appear to the department of agriculture that the manufacturer of said fertilizer in question has, in the manufacture or other goods, offered in this State during such season, employed such ingredients as are outlawed by the provisions of this article; or, (3) unless it shall appear to the Department of Agriculture that the manufacturer of said fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods. The last two provisions are to take care of causes of action like the counsel for the plaintiff in error denominates his first cause of action. In this connection, it is quite proper to note that the cases in the first part of this brief show that the statute was designed to protect the honest farmer against the dishonest and fraudulent fertilizer manufacturer and to protect the honest manufacturers against the dishonest and fraudulent farmers. See the language of Mr. Justice Walker in *Carson v. Bunting, supra*. It was just as foreign to the purpose of the statute to place an honest fertilizer manufacturer at the mercy of the dishonest and fraudulent farmer by allowing it be mulcted in damages for one innocent act as it was to allow the honest farmer to suffer from the deceit and fraud of the fertilizer manufacturer. With this in view, the legislature, by the last two provisions, struck a middle ground—a ground between that of the single, inno-

cent, or inadvertent act of the fertilizer manufacturer and the wilful deceit of such manufacturer. The fertilizer manufacturer cannot claim the benefit of the statute if his goods have on two or more separate occasions proven to have contained outlawed ingredients, as designated by the statute (see Appendix), or if it appears that the manufacturer has offered any kind of dishonest or fraudulent goods. Then if the plaintiff in error happens to be in a position so that his individual interests must give way, under a reasonable police regulation, to the general welfare of the entire State his individual position may be unfortunate but that will not make the statute unconstitutional.

Jacobson v. Mass., 197 U. S., 11; 49 L. Ed., 643.
Powell v. Penn., 127 U. S., 678; 32 L. Ed., 253.

(c) *The statute does not substitute the arbitrary discretion of an administrative department for a judicial inquiry of the court.*

The counsel for the plaintiff in error argues that the phrase in the statute "shall appear to the Department of Agriculture" means that the Department of Agriculture must be convinced of this fact, and that it could refuse to be convinced. In point of law the phrase has no such meaning. In the case of *People v. Macon County*, 19 Ill. App., 264, 2[illegible], affirmed 121 Ill., 616; 13 N. E., 220), an almost identical phrase was construed. In construing a statute which provided, in part, "and if the foregoing facts shall appear the county board shall appropriate from the county treasury a sum sufficient to meet one-half the expense of said bridge or other work," etc., the court said

"The clause in question invests the county board in such cases with no more discretion or right of final judgment as to the duty of making the appropriation than is possessed by all parties charged with an imperative duty upon condition or in a case prescribed. To all such parties the facts constituting the conditions or case upon which the duty arises must 'appear.' But they do appear, in the sense intended when they are set forth or presented—when information of them is given—to such party in the manner prescribed by the law imposing the duty, if any is so prescribed, or, if not, in any reasonable and effectual manner. * * * The means and mode of information to the county board of the conditions or case for its performance, is the petition with the accompanying papers in proper form. If they contain and present them they thereby do 'appear' in the sense of the law."

In *State v. Powell*, 77 Miss., 543, 569; 27 Sou., 927; 48 L. R. A., 652, the court held that the term "appear" as used in a constitutional provision that "if it shall appear" that a majority of the electors voting at a certain election shall have voted for a proposed constitutional amendment it shall become a part of the Constitution, means "if it shall be made manifest, or evident," "if it shall be the fact that," etc., and whether or not it has so appeared or is a fact is a judicial question determinable by the court.

If a purchaser of fertilizer endeavors "to make it appear" to the Department of Agriculture, in order to take himself out from under the limitations of the statute, that his vendor has during that season sold to another fraudulent and outlawed goods, and that the Department refuses to hear him

or, pretending to hear him, refuses to admit the force of his evidence, we have little doubt but that his right to resort to the courts with a view to remedying that situation is unimpaired by the statute. It is elementary that a statute will not be so construed as to raise a doubt of its constitutionality unless its language is so plain as to compel the suggested construction. There is nothing on the face of the statute, or to be necessarily implied from its words, indicating that the Department of Agriculture has any function to perform with respect to the purchaser other than to give him an opportunity to be heard. The statute does not say that the Department must be satisfied of the *bona fides* or accuracy of the purchaser's facts. Should the Department refuse to give the purchaser an opportunity to be heard or act in any other particular arbitrarily or unreasonably, we fail to find in the statute that the Legislature intended to commit the matter solely to that Department so as to deprive the purchaser of the right of resort to the court to correct such arbitrary action.

Adopting the language of the Supreme Court of Iowa in speaking of certain provisions of the workmen's compensation act of that State (154 N. W., 1061) and quoted in *Hawkins v. Bleakly*, 243 U. S., 210, 215; 61 L. Ed., 678, 684 (1916):

> "We are in no doubt that the very structure of the law of the land, and the inherent power of the courts, would enable them to interfere, if what we have defined to be the jurisdiction conferred upon the arbitration committee were by it exceeded."

The length to which the Supreme Court of North Carolina will go to preserve the inherent rights of its citizens to a judicial hearing as against arbitrary action by administrative

agencies is indicated in *Dickson v. Perkins*, 172 N. C., 259 (1916), where the statute failed to allow, certainly expressly, an appeal from an administrative agency to assess damages for property taken for public use, and the court held that unless the statute clearly showed that the action of the administrative agency was to be final "the Superior Court, in the exercise of its general powers of supervision and control over any and all subordinate tribunals, may, in proper instances, bring the cause before it for review, assuredly so in case of manifest and gross abuse."

Again, we respectfully submit that the plaintiff in error is not in a position to question this particular phrase of the statute. He has not alleged nor tried to prove that he attempted to comply with this particular part of the statute. He should have at least made an effort to bring himself within the alleged objectionable part of the statute, so that he would be in a position to question its validity. In this case he is precluded from attacking it by his failure so to do. *Del Castillo v. McConnico*, 168 U. S., 674; 42 L. Ed., 622, where the court held that one claiming that a State statute violates the Fourteenth Amendment is limited solely to the inquiry whether in the case which he himself presents the statute has operated to infringe his constitutional rights, and the court will not consider whether in a different case the statute might so operate.

Nor can it be presumed in this connection that the Legislature did a vain thing. In fact that the presumption is that the statute is constitutional, and that the Legislature had a real purpose in mind in using that phrase. A reasonable purpose to serve by it is sufficient to justify it. The purpose in the mind of the Legislature in this connection was to give

to the Department of Agriculture a more complete check on the fertilizer manufacturers; to require such a report to be made to the Department of Agriculture would enable the department to investigate its merits, give it information upon which it could act intelligently in enforcing the statutes, and, when need be, prosecute criminal, the fraudulent and dishonest manufacturer under section 4694 of the *Consolidated Statutes of North Carolina*. The facts are "made to appear to the Department of Agriculture" when they are set forth or presented, and the plaintiff has then co-operated with the State to protect his own interest. It then becomes a question for judicial determination as to whether the fact is "made to appear" according to the Mississippi case, *supra*, just as any other fact before the court.

The sixth paragraph of the statute, as has already been observed, reserves to the prospective purchaser full liberty to make special contracts for the purchase of fertilizer. It is his election then as to how he shall buy. If in exercising that election he contracts away some of his rights and remedies he is precluded from asserting them later by his own voluntary act.

(f) A reasonable numerical limit is not objectionable under a valid exercise of the police power.

There are two numerical limits or lines drawn by the statute—one with reference to a sample from 10 per cent of the lot or not less than ten bags, and the other with reference to the taking of the samples within thirty days after actual delivery. The establishment of numerical limits under the police power is necessary, and without a showing that they

have been established without rhyme or reason they will not be declared void. The leading case on this subject is *Murphy v. California*, 225 U. S., 623; 56 L. Ed., 1229, where a city ordinance prohibited any person from operating a pool hall and excepted hotels of more than twenty-five rooms. The defendant was indicted under the statute for operation a pool-room and pleaded the unconstitutionality of the statute. The court held that the statute was not unconstitutional because it had an arbitrary numerical limit of twenty-five rooms, but that it was a proper exercise of the police power. Another case where an arbitrary limit was upheld as a valid exercise of the police power is *Barbier v. Connolly*, 113 U. S., 27; 28 L. Ed., 923.

Conclusion.

We can but conclude by saying that the statute is a valid exercise of the police power of the State, passed as a real economic necessity, to further a valuable industry of the State, and in this way to promote its general welfare. With this in view the statute is reasonable, fair to every one concerned, and well calculated to serve its purpose. As a clear manifestation of its fairness to the farmers and consumers there is reserved to them the opportunity and privilege to make a special contract to purchase fertilizer and by such they may reserve all of their common-law rights and remedies, or may even enlarge them. The statute applies equally to all persons within its classification, which is reasonable, and thus satisfies the equality clause of the Fourteenth Amendment to the Federal Constitution. The due-process clause of the Fourteenth Amendment is not violated because

no property rights are taken from the plaintiff in error by its operation. If he comes under the statute, it is by his own voluntary act and election. It is his contract to do so. The statute exacts no more than sheer necessity demands—merely the minimum that could be expected commensurate with the vast importance of the subject-matter. We respectfully submit that it satisfies every Federal constitutional guarantee.

Respectfully submitted,

LOUIS M. SWINK,
W. M. HENDREN,
Counsel for Defendant in Error.

OSCAR O. EFIRD,
Of Counsel.

APPENDIX.

Sections from the Consolidated Statutes of North Carolina, Known as the Fertilizer Statutes.

Commercial Fertilizers.

4690. *Packages to be Branded with Specified Particulars; Copy to be Filed.*—All persons, companies, manufacturers, dealers, or agents, before selling or offering for sale in this State any commercial fertilizer or fertilizer material, shall brand or attach to each bag, barrel or package the brand name of the fertilizer, the weight of the package, the name and address of the manufacturer, and the guaranteed analysis of the fertilizer, giving the valuable constituents of the fertilizer in minimum percentages only, and also the source of nitrogen or ammonia and potash. These items shall be branded or printed on the bag or package in the following order:

1. Weight of each package in pounds.
2. Brand name or trade-mark.
3. Guaranteed analysis.
4. Available phosphoric acid — per cent.
5. Nitrogen (or equivalent in ammonia) — per cent.
6. Potash — per cent.
7. Name and address of the manufacturer.
8. A plainly printed tag, or brand, or print on preventage or water-soluble nitrogen.
9. Where potash is claimed as sulphate it must be derived from high-grade commercial sulphate of potash.

In bone-meal, tankage, or other products, where phosphoric acid is not available to laboratory methods, but becomes available on the decomposition of the products in the

soil, the phosphoric acid shall be claimed as total phosphoric acid, unless it is desired to claim available phosphoric acid also, in which latter case the guarantee must take the form above set forth. In the case of bone-meal and tankage, manufacturers may brand on the bags information showing the fineness of the product, provided it takes a form approved by the Department of Agriculture. A copy of the brand or stamp on the bag or other package, or on the label attached thereto (all of which must comply with the above requirements), shall be filed with the Department of Agriculture on or before delivery of such fertilizer to dealers, agents, and consumers in this State, which brand or stamp shall be uniformly used during the fiscal year for which tags have been issued. Such brand, label, or stamp shall truly set forth the data required above.

1917, c. 143, s. 1.

4691. *Rules to Enforce Statute; Violation Misdemeanor.*—The board of agriculture is empowered and directed to make such rules and regulations as are necessary to a proper carrying into effect of the provisions of this article, and to provide for all such tags as manufacturers may demand, upon paying the tax therefor. Any person willfully violating any of the regulations made by the board of agriculture in connection with the provisions of this article shall be guilty of a misdemeanor.

Rev., s. 3821, c. 179, s. 4, subsec. 9.

4692. *Sources of Ingredients to be Disclosed to Department.*—There shall be delivered to the department a statement of the materials or sources from which the phosphoric acid, nitrogen, and potash are each derived in each brand of goods registered. The Department of Agriculture shall, under the rules which it may formulate, furnish to any person applying for same, the sources of nitrogen, potash, and available phosphoric acid contained in any brand of fertilizer

registered with the department. If the source of the ingredient is changed, notification thereof shall be promptly furnished to the department.

1917, c. 143, s. 2.

1693. *Brand Names: Registration; Duplication of Brand.*—If the same fertilizer is sold under more than one name, a statement shall be furnished to the commissioner as to what brands are identical. A brand name entered by one person, shall not be allowed to be registered by another, and no brand or name shall be allowed to be registered which is so nearly similar to another as to lead to uncertainty, confusion, or fraud. The person whom the records of the department show to have first registered the name shall be permitted to retain it, subject, however, to appeal to the board to determine who is entitled to the brand; but the action of the board shall be without prejudice to the legal rights of the parties to the brand or trade-mark. No brand or name once registered shall be changed to a lower grade at any subsequent registration. The commissioner shall publish a list of brands or trade marks registered with the department.

1917, c. 143, s. 3.

1694. *Use of Terms "High Grade" and "Standard."*—The words "high grade" shall not appear upon any bag or other package of any complete fertilizer which complete fertilizer contains, by its guaranteed analysis, less than eight per cent available phosphoric acid, two and forty-seven one-hundredths per cent nitrogen (equivalent to three per cent ammonia), and two per cent potash; that the word "standard" shall not appear upon any bag or package of any complete fertilizer which contains, by its guaranteed analysis, less than eight per cent available phosphoric acid, one and sixty-five one-hundredths per cent nitrogen (equivalent to two per cent ammonia), and two per cent potash, or a grade or analysis of equal total commercial value; that the words "high grade" shall not appear upon any bag or package of

any acid phosphate with potash which shall contain, by its guaranteed analysis, less than thirteen per cent available phosphoric acid and one per cent potash, or a grade or analysis of equal total commercial value; that the word "standard" shall not appear upon any bag or package of acid phosphate with potash which shall contain, by its guaranteed analysis, less than eleven per cent available phosphoric acid and one per cent potash, or a grade or analysis of equal total commercial value; that the words "high grade" shall not appear upon any bag or other package of any plain acid phosphate which shall contain, by its guaranteed analysis, less than sixteen per cent available phosphoric acid; and, lastly, that the word "standard" shall not appear upon any bag or other package of any plain acid phosphate which shall contain, by its guaranteed analysis, less than fourteen per cent of phosphoric acid. Or is further hereby provided that no complete fertilizer, acid phosphate with potash, and phosphate with nitrogen, or plain acid phosphate, shall be offered for sale in this State which contains less than twelve per cent of total plant food, namely, available phosphoric acid, nitrogen, or potash, either singly or in combination, except potash in combination with lime, which shall contain not less than two per cent of potash: Provided, that in mixed fertilizers there shall be claimed not less than one per cent of potash and eighty-two one-hundredths per cent of nitrogen (equivalent to one per cent ammonia), when one or both are present at the same mixture; and also, that mixed fertilizers known as superphosphates and containing only phosphoric acid and ammonia may have only ten per cent of plant food, and shall be known as "high grade" when containing six per cent of phosphoric acid and four per cent of ammonia.

No commercial fertilizer shall be sold or offered for sale or use within this State as to which the words "high grade" or "standard" are prohibited by this section, unless the words "low grade" are printed in two-inch letters in a conspicuous place upon the package of said commercial fertilizer.

1917, c. 143, s. 4.

4695. *Sale Below Guaranteed Quality; Duty of Commissioner; Purchaser's Option.*—Whenever the Commissioner of Agriculture shall be satisfied that any fertilizer is five per cent below the guaranteed value in plant food, it shall be his duty to assess such deficiency against the manufacturer of the fertilizer and require that twice the value of the deficiency be made good to any person who purchases for his own use such low-grade fertilizer; and should any fertilizer fall as much as ten per cent below the guaranteed value in plant food it shall be his duty to assess three times the value of such deficiency against the manufacturer of the fertilizer and require the same to be paid to the consumer of such fertilizer; and the commissioner may seize any fertilizer belonging to such manufacturer if the deficiency shall not be paid within thirty days after such notice to such manufacturer. If the commissioner shall be satisfied that such deficiency in plant food was due to the intention of the manufacturer of same to defraud, then he shall assess and collect from the said manufacturer double the amount of the deficiency which he would have assessed and collected as hereinbefore provided, and pay the same over to the consumer of such fertilizer. Any excess of any ingredient above the guarantee shall not be credited to the deficiency of any other ingredient if the deficiency is more than fifteen per cent; that is, excess of the phosphoric acid or ammonia, or potash, cannot be credited to the deficiency of any other of these ingredients, and in assessing deficiencies arising in this connection the deficiency shall be assessed at four times the value of such deficiencies, such deficiencies to be assessed and paid as hereinbefore provided. In fixing the penalties mentioned in this section, or in any other section of this article, the Commissioner of Agriculture shall estimate them by the wholesale price at the factory at the time of contract. If any manufacturer shall resist such collection or payment, the commissioner shall immediately publish the analysis and facts in the bulletin

and in one or more newspapers in the state, to be selected by him. The Agricultural Department shall secure sufficient chemists and assistants, and provide the necessary equipment to enable the department to make a report of the chemical analysis of all fertilizer samples sent to the department by the purchaser or consumer, within twenty days from the time the same is received by the sender, and shall also publish a bulletin of all analyses on the first of each month for the preceding month: *Provided*, that if the analysis made by the department shall show more than twelve and one-half per cent deficiency in the whole, the purchaser may, in lieu of accepting the penalty as provided by law, cancel the contract of purchase; but he must within five days after receipt of said analysis notify the seller of his intention to cancel the contract and his refusal to keep the said fertilizer.

1917, c. 113, s. 5; 1919, c. 120, s. 1.

1696. *Certain Ingredients Prohibited.*—It shall be unlawful to sell or offer for sale in this state any fertilizer or fertilizer material which contains hair, hoof, meal, horn, leather scraps, or other deleterious substances not available as food for plants, but in which fertilizer or fertilizer material such forbidden materials aid in making up the required or guaranteed analysis. Whenever the analysis by the department shall show the presence of any of these unlawful materials in goods registered for sale, publication shall be made in the next monthly bulletin and in one or more newspapers, to be selected by the commissioner, giving the name and brand of the goods and the unlawful substance contained in its composition. No manufacturer or seller of such goods shall be allowed to collect pay for same, and when payment has been made it shall be returned by the seller to the purchaser. A copy of the bulletin containing the statement of the presence of unlawful material in the named goods shall be evidence in any court in this state

in bar of payment and recovery of money paid for goods so named. The presence of any forbidden material shall vitiate the whole: *Provided*, that the manufacturers who desire to use any such material may do so under such regulations as the board may prescribe.

Any person who shall wilfully sell or offer for sale any fertilizer material containing the substances by this section said to be deleterious shall be guilty of a misdemeanor.

Rev., s. 3818; 1901, s. 9; 1917, c. 143, s. 6.

4697. *Collection and Analysis of Samples; Analyst's Certificates as Evidence.*—The Department of Agriculture shall have the power at all times and at all places to have collected by its inspector samples of any commercial fertilizer or fertilizer material offered for sale in the state, and have the same analyzed; and such samples shall be taken from at least ten per cent of the lot from which they may be selected: *Provided*, that no sample shall be drawn from less than ten bags of any one lot or brand.

The samples must be drawn in the presence of either the agent or seller or dealer, or some other representative of the manufacturer: *Provided*, that when the agent or seller, or dealer, or local representative of the manufacturer, is not present or refuses to act, two disinterested persons may act as witnesses.

The purchaser or consumer, or the agent of either, may take fertilizer samples under the following rules and regulations: When any purchaser or consumer, or agent of either, desires to take a sample of any fertilizer or fertilizer material, he may take such sample according to the rules prescribed by the Department of Agriculture in the presence of a county or local representative designated by the manufacturer, and notice of which shall be given by the manufacturer on the bill of lading, or, in case there is no county or local representative, or he is unable to serve for any cause, in the presence of an agent, seller or dealer of the

manufacturer and to disinterested freeholders; or, in case the agent, or seller, or dealer, or local representative of the manufacturer refuses to witness the drawing of such sample, a sample may be drawn in the presence of three disinterested freeholders: *Provided*, such sample or samples shall be drawn with the same kind of instrument used by the inspectors of the Department of Agriculture in taking samples, the sample to be thoroughly mixed as prescribed by the rules of the Department of Agriculture, divided into two parts, each part to be placed in a suitable vessel, securely sealed, properly labeled, and one part sent to the Department of Agriculture for analysis, and the other part to the manufacturer; and a suitable statement shall be signed by the parties taking, or witnessing the taking of the sample covering the matter; such statement or statements to be also sent to the Department of Agriculture and the manufacturer.

The Department of Agriculture shall make additional rules and regulations under and by which the purchaser or consumer, or agent of either, may take the sample or samples of fertilizer or fertilizer material as herein provided, and forward the same to the department for analysis under the provisions of this article: *Provided*, That no sample may be taken except within thirty days after the actual delivery to the consumer except by the State Fertilizer Inspector.

In the trial of any suit or action wherein there is called in question the value or composition of any fertilizer, a certificate signed by the State Chemist and attested with the seal of the Department of Agriculture, setting forth the analysis made by the State Chemist of any sample of said fertilizer drawn under the provisions of this article, and analyzed by him under the provisions of the same, shall be prima facie proof that the fertilizer was of the value and constituency shown by said analysis. And the said certificate of the State Chemist shall be admissible in evidence to the same extent as if it were his deposition taken in said action in the manner prescribed by law for taking of depo-

sitions. The department shall refuse to analyze any sample of commercial fertilizer that is not drawn and forwarded to the department in accordance with the regulations which it may adopt for the carrying out of this article: *Provided*, That no suit for damages from results of use of fertilizer may be brought except chemical analysis showing deficiency of ingredients, unless it shall appear to the Department of Agriculture that the manufacturer of said fertilizer in question has, in the manufacture of other goods offered in this State during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the Department of Agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods.

Nothing in this article shall impair the right of contract.

1917, c. 143, s. 7; 1919, c. 120, ss. 2, 3.

4698. *Tax Tags on Shipment in Bulk.*—If any manufacturer, dealer, agent or other seller of fertilizer shall desire to ship in bulk any fertilizer or fertilizer material to an amount of five tons or more, the said manufacturer or seller of fertilizer shall send with the bill of lading, sufficient tags to pay the tax on the amount of goods, and the agent of the railroad or other transportation company shall deliver the tags to the consignee when the goods are delivered. The said shipper shall also notify the Commissioner of Agriculture of the points to and from which the goods are shipped and the date of forwarding: *Provided*, the analysis thereof and the source or sources from which the same are derived and the other regulations required of shippers in bags shall apply to the said shippers in bulk.

1917, c. 143, s. 8.

4699. *Carriers to Furnish Statements of Fertilizers Transported.*—It shall be lawful for the Department of Agriculture to require the officers, agents, or managers of any rail-

road, steamboat or other transportation company transporting fertilizer or fertilizer material for delivery in this State to furnish monthly statements of the quantity of such fertilizers, with the names of the consignor and consignee, delivered on their respective lines at any and all points within the State; and the department is hereby empowered to compel such officers, agents, or managers to submit their books for examination, if found expedient to do so. Persons failing to furnish statements as required by this section shall be guilty of a misdemeanor.

Rev., s. 3819; 1901, c. 479, s. 101; 1917, c. 143, s. 9.

4700. *Forfeiture for Unauthorized Sale; Release From Forfeiture.*—All fertilizers and fertilizer materials sold or offered for sale contrary to the provisions of this article shall be subject to seizure, condemnation, and sale by the commissioner. The net proceeds of such sale shall be placed in the general fund of the department. The commissioner, however, may, in his discretion, release the fertilizers so seized and condemned upon payment of the required tax or charge, a fine of ten dollars, and all cost and expenses incurred by the department in any proceedings connected with such seizure and condemnation, and upon compliance with all other requirements of this article.

1917, c. 143, s. 10.

4701. *Method of Seizure and Sale of Forfeiture.*—Such seizure and sale shall be made under the direction of the commissioner by any officer or agent of the department. The sale shall be made at the courthouse door in the county in which the seizure is made, after thirty days advertisement in some newspaper published in such county, or if no newspaper is published in such county, then by like advertisement in a newspaper published in the nearest county thereto having a newspaper. The advertisement shall state

the brand or name of the goods, the quantity, and why seized and offered for sale.

1917, c. 143, s. 11.

4702. *Inspection Tax on Fertilizer; Tax Tags.*—For the purpose of defraying expenses with the inspection of fertilizers and fertilizer materials in this State, there shall be paid to the Department of Agriculture a charge of twenty cents per ton on such fertilizers and fertilizer material, except that which is sold to a manufacturer for the sole purpose of use in the manufacture of fertilizers, for each fiscal year ending November thirtieth, which shall be paid before a delivery to agents, dealers, or consumers in this State; but the commissioner with the advice and consent of the board, shall have discretion to exempt such natural material as may be deemed expedient. Each bag, barrel, or other package of such fertilizer material shall have attached thereto a tag stating that all charges specified in this section have been paid, and the commissioner, with the advice and consent of the board, is hereby empowered to prescribe a form of such tags, and to adopt such regulations as will ensure the enforcement of this law. Whenever any manufacturer of fertilizer material shall have paid the charges required by this section his goods shall not be liable to further tax, whether by city, town, or county: *Provided*, this shall not exempt from ad valorem tax.

1917, c. 143, s. 12.

4703. *Sale Without Tag; Misuse of Tag, Penalty; Forfeiture.*—Every merchant, trader, manufacturer, broker, or agent, who shall sell or offer for sale any commercial fertilizer or fertilizer material without having attached thereto such labels, stamps, and tags as are required by law, or who shall use the required tags a second time to avoid the payment of the tonnage charge, and every person who shall aid in the

fraudulent selling or offering for sale of any such fertilizer, shall be liable to a penalty of the price paid the manufacturer for each separate bag, barrel, or package sold, or offered for sale, or removed to be recovered by the Commissioner of Agriculture by suit brought in the name of the State, and any amount so recovered shall be paid, one-half to the informer and one-half to the State treasurer for the use of the Department of Agriculture. If any such fertilizer shall be condemned as provided by law, it shall be the duty of the department to have an analysis made of the same and cause printed tags or labels, expressing the true chemical ingredients thereof to be put upon each bag, barrel, or package, and shall fix the commercial value at which it may be sold. It shall be unlawful for any person to sell or offer for sale or remove any such fertilizer, or for any agent of any railroad or other transportation company to deliver any such fertilizer in violation of this section, and any person who shall sell or offer for sale or remove any fertilizer in violation of the provisions of this section shall be guilty of a misdemeanor.

Rev., ss. 3830, 3822; 1901, c. 479, ss. 5, 8; 1917, c. 113; 1919, c. 13, s. 3.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 73.

RICHARD M. JONES, PLAINTIFF IN ERROR,

vs.

UNION GUANO COMPANY, INCORPORATED.

BRIEF OF PLAINTIFF IN ERROR.

EDWARD C. JEROME,
Counsel for Plaintiff in Error.

J. M. SHARP,
B. L. FENTRESS,
Of Counsel.

SUBJECT INDEX.

Table of Cases Cited.

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ACCEPTANCE OF SERVICE OF BRIEF.

I hereby accept service of the brief of plaintiff in error in the above-entitled case and acknowledge receipt of a copy of same.

This the 6th day of September, 1923.

LOUIS M. SMINK,
Counsel for Defendant in Error.

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vs.

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BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

This is an action for the recovery of damages on account of injury to a crop of tobacco by fertilizer bought from defendant in error. It was tried in the Superior Court of Rockingham County, North Carolina, in November, 1921, and the case was dismissed by a judgment of non-suit for failure to comply with section 4697 of the Consolidated Statutes of North Carolina. That judgment was affirmed by the Supreme Court of North Carolina (Record, page 52), and the case was brought here upon a writ of error alleging that said

statute is unconstitutional and void under the Fourteenth Amendment.

This constitutional question was raised by plaintiff's reply (Record, page 14), and by brief and argument in the State Supreme Court, as shown by its opinion (Record, page 52).

The chief obstacle presented by the statute (copied in the appendix to this brief) is in the following provisos:

> "*Provided*, that no suit for damages from results of use of fertilizer may be brought except after chemical analysis showing deficiency of ingredients, unless it shall appear to the Department of Agriculture that the manufacturer of said fertilizer in question has, in the manufacture of other goods offered in this State during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the department of agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods."
>
> "*Provided*, that no sample may be taken except within thirty days after the actual delivery to the consumer except by the State fertilizer inspector."
>
> "*Provided*, that no sample shall be drawn from less than ten bags of any one lot or brand."
>
> "*Provided*, such sample or samples shall be drawn with the same kind of instrument used by the inspectors of the Department of Agriculture in taking samples."

The important part of plaintiff's cause of action is the allegation that the fertilizer contained a substance harmful to the growth of tobacco. The complaint alleges that the defendant, defendant in error here, manufactured and sold to the plaintiff fifty-one sacks of fertilizer which contained

a substance harmful to the growth of tobacco, and that the fertilizer was deficient in the ingredients that it was represented to contain. The plaintiff used the fertilizer on good land planted with tobacco, which was properly cultivated, and the weather and climatic conditions were good for the growth of tobacco. The fertilizer "contained substances that destroyed the productiveness of the soil and prevented the plaintiff from making more than one-fourth to one-third of a crop of tobacco" (paragraph 3 of complaint, page 10 of record).

In 1919 the plaintiff was one of nineteen farmers who ordered a carload of fertilizer from the defendant company. The evidence shows that one John R. Williams was the agent, either of the defendant fertilizer company or of the plaintiff farmers, and that he had this fertilizer delivered to them (Record, page 19). The plaintiff testified that he used 680 pounds of the fertilizer to the acre in land planted with tobacco; that it was a good season for tobacco, and that he made about three hundred pounds of tobacco to the acre; that under the same conditions, if the fertilizer had been good, he would have made six hundred and fifty pounds to the acre (Record, end of page 28 and page 29). This tobacco brought only 39 cents per pound when it should have brought 70 cents. The plaintiff in 1919, the year this fertilizer was used, had 15 acres in tobacco, and it brought $1,751.32; in 1918 he had about 14 acres in tobacco, and it brought $1,000.00 (Record, top of page 32). In 1920 he made 900 pounds to the acre. The agricultural agent for the county testified that the plaintiff's land was well cultivated, but that his tobacco was very poor. One of the farmers testified that he had saved from the year before some of this same brand of

fertilizer, which he used on part of his crop, and that he also used some of that bought in 1919 from the car lot in question, both being used in clearly divided parts of the same field. The crop was good on the land on which the former was used, and very poor on the land attempted to be fertilized with the 1919 lot (Record, middle of page 42). After it was evident that the tobacco crops of all farmers who had bought this fertilizer were going to be failures samples were drawn from two unopened bags from the carload bought from defendant company (Record, testimony of Hugh Johnson, page 34, and of J. A. Kemp, page 37), and these samples were sent to the State Department of Agriculture and to another chemist for analysis. One analysis showed a deficiency of the stated ingredients (Record, page 15). These samples could not be drawn in compliance with the statute because all of the fertilizer had been used, except two bags. The witness Dr. Arbuckle, who was a chemist, testified (Record, page 45) that "this fertilizer contained some agent that interfered with the growth of tobacco." He also testified that he and his assistant made elaborate experiments with the samples of fertilizer in arriving at this conclusion. His assistant, testifying as to the harmful substance in the fertilizer, said: "That substance was removed incidentally in our removing the chlorine when we heated the fertilizer. After this process was complete, the fertilizer was good for tobacco, and was not good for the growth of tobacco before" (Record, page 49).

Specification of Errors.

When the writ of error was obtained the following assignment of errors was made (Record, page 3):

I.

Because the Supreme Court of North Carolina erred in deciding that, although the plaintiff in error had alleged that defendant in error had damaged his tobacco crop by selling him fertilizer which contained a substance harmful to tobacco, and that plaintiff in error had introduced evidence tending to show the inferior quality of the said fertilizer, deficiency of stated ingredients, and injury to the said crop of tobacco, section 4697 of the Consolidated Statutes of North Carolina providing "that no suit for damages from results of use of fertilizer may be brought except after chemical analysis showing deficiency of ingredients, unless it shall appear to the Department of Agriculture that the manufacturer of said fertilizer in question, has, in the manufacture of other goods offered in this State during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the Department of Agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods," is not void under the Fourteenth Amendment to the Constitution of the United States and is a constitutional statutory bar to this action.

II.

Because the Supreme Court of North Carolina erred in deciding that it was within the power of the Legislature of North Carolina to enact said section 4697 of the Consolidated Statutes making the introduction of a certificate of chemical analysis showing deficiency of ingredients made by the State Department of Agriculture in accordance with the provisions of

said statute a condition precedent to the maintenance of the cause of action of plaintiff in error for damages on account of the wrongful insertion in fertilizer sold plaintiff in error by defendant in error of a substance harmful and injurious to the growth of tobacco.

III.

Because the Supreme Court of North Carolina erred in deciding that it was within the power of the Legislature of North Carolina to enact said section 4697 of the Consolidated Statutes making the introduction of a certificate of chemical analysis showing a deficiency of ingredients made by the State Department of Agriculture in accordance with the provisions of said statute a condition precedent to the maintenance of the cause of action of plaintiff in error for a deficiency of the stated ingredients of the fertilizer bought from defendant in error.

IV.

Because the Supreme Court of North Carolina erred in refusing to decide that section 4697 of the Consolidated Statutes of North Carolina deprives the plaintiff in error of his right of action and property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, in that it requires him to prove, in addition to damage resulting from negligence of defendant in error, dishonesty and fraud on the part of defendant in error, or that a like cause of action against defendant in error exists in favor of some other person.

V.

Because the Supreme Court of North Carolina erred in refusing to decide that section 4697 of the Con-

solidated Statutes of North Carolina deprives the plaintiff in error, a person within the jurisdiction of said State, of the equal protection of the law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

VI.

Because the Supreme Court of North Carolina erred in refusing to hold that section 1697 of the Consolidated Statutes of North Carolina vested an unreasonable and arbitrary discretion in the State Department of Agriculture, which deprives the plaintiff in error of his right of action and property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, the provision of said statute here questioned being:

"*Provided*, that no suit for damages from results of use of fertilizer may be brought except after chemical analysis showing deficiency of ingredients, unless it shall appear to the Department of Agriculture that the manufacturer of said fertilizer in question has, in the manufacture of other goods offered in this State during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the Department of Agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods."

VII.

Because the Supreme Court of North Carolina has erred in deciding that said section 1697 of the Consolidated Statutes of North Carolina is not contrary to the Fourteenth Amendment to the Constitution of the United States in the following provisions con-

cerning the drawing of samples for the chemical analysis required by said section for the purposes of this suit:

"*Provided*, that no sample shall be drawn from less than ten bags of any one lot or brand."

"*Provided*, such sample or samples shall be drawn with the same kind of instrument used by the inspectors of the Department of Agriculture in taking samples."

"*Provided*, that no sample may be taken except within thirty days after the actual delivery to the consumer except by the State fertilizer inspector."

VIII.

Because the Supreme Court of North Carolina erred in signing the judgment which appears in the record as the judgment of that court.

These assigned errors may be grouped under two propositions:

I.

The statute denies to the plaintiff in error the equal protection of the law. Under this proposition numbers I, II, IV, and V are treated.

II.

The statute deprives plaintiff in error of a property right without due process of law.

Under this proposition numbers III, VI, and VII are treated. Number VIII is merely formal.

Brief of the Argument.

I.

The statute denies to the plaintiff in error the equal protection of the law.

1. The insertion of a harmful substance into the fertilizer sold was a tort.

Bowers *v.* Railroad, 107 N. C., 721.
Reynolds *v.* Railroad, 136 N. C., 345.

2. By the general principles of law in North Carolina the defendant in error would be liable for the damages alleged.

Tomlinson *v.* Morgan, 166 N. C., 557.
McPherson *v.* Buick Motor Co., 217 N. Y., 382.
Johnson *v.* Cadillac Motor Co., 261 Fed., 878.
Ward *v.* Morehead City Sea Food Co., 171 N. C., 33.

3. The statute, in the absence of the required certificate, abolishes all remedy for damage caused by the insertion of a harmful substance in fertilizer, unless done dishonestly or fraudulently, or accompanied by a similar injury to another person.

Sec. 4697 Consolidated Statutes of North Carolina (set out in appendix to brief).

4. A State cannot abolish all remedy for an admitted tort.

Truax *v.* Corrigan, 257 U. S., 312.
Tomlinson *v.* Morgan, 166 N. C., 557.
Atchison, T. & S. F. Ry. Co. *v.* Vosburg, 238 U. S., 56.
Park *v.* Detroit Free Press Co., 72 Mich., 760.

5. The classification with reference to a tort, of farmers on one side and fertilizer manufacturers on the other, cannot be sustained.

Truax *v.* Corrigan, 257 U. S., 312.

Connolly *v.* Union Sewer Pipe Co., 184 U. S., 540.

II.

The statute deprives plaintiff in error of a property right without due process of law.

1. The statute makes the following conditions precedent to the maintenance of this action:

> "Unless it shall appear to the Department of Agriculture that the manufacturer of said fertilizer in question has, in the manufacture of other goods offered in this State during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the Department of Agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods."
>
> "*Provided*, that no samples may be taken except within thirty days after the actual delivery to the consumer except by the State fertilizer inspector."
>
> "*Provided*, that no sample shall be drawn from less than ten bags of any one lot or brand."
>
> "*Provided*, such sample or samples shall be drawn with the same kind of instrument used by the inspectors of the Department of Agriculture in taking samples."

2. All of these conditions are repugnant to the due process clause:

(*a*) No statute can make any evidence conclusive.

U. S. *v.* Klein, 13 Wall., 128.

Chicago, M. & St. P. Ry. Co. *v.* Minnesota, 134 U. S., 418.

Missouri, K. & T. Ry. Co. *v.* Simmons, 64 Kan., 802.

(*b*) It follows that the absence of any particular evidence cannot be made conclusive.

U. S. *v.* Klein, 13 Wall., 128.

Chicago, M. & St. P. Ry. Co. *v.* Minnesota, 134 U. S., 418.

Missouri, K. & T. Ry. *v.* Simonson, 64 Kan., 802.

(*c*) The statute is void because it substitutes the arbitrary discretion of an executive department for the judicial inquiry of the courts.

Chicago, M. & St. P. Ry. Co. *v.* Minnesota, 134 U. S., 418.

McFarland *v.* American Sugar Ref. Co., 241 U. S., 79.

Bailey *v.* Alabama, 219 U. S., 219.

Reitler *v.* Harris, 223 U. S., 437.

Mobile, J. & K. C. R. R. Co. *v.* Turnipseed, 219 U. S., 35.

Barbier *v.* Connolly, 113 U. S., 27.

Yick Wo *v.* Hopkins, 118 U. S., 356.

State *v.* Tenant, 110 N. C., 609.

ARGUMENT.

I. THE STATUTE DENIES TO THE PLAINTIFF IN ERROR THE EQUAL PROTECTION OF THE LAW.

1. *The insertion of a harmful substance into the fertilizer sold is a tort.*

The complaint in this action may be treated as alleging two causes of action: first, because the defendant wrongfully inserted into the fertilizer sold plaintiff a substance harmful to tobacco; second, for failure to put into the fertilizer the ingredients that it was represented to contain, one cause of action being for destruction, the other for failure to help as represented.

The effect of this statute, the part quoted in the statement of the case above, is that the plaintiff cannot recover on his first cause of action unless he proves his second cause of action, or proves either that the defendant has done a similar wrong to some other person during the same "season," or was "dishonest or fraudulent" in inserting the harmful substance into the fertilizer. The statute thus imposes upon the plaintiff the burden of complying with three conditions precedent to the maintenance of his cause of action for injury by reason of the wrongful insertion of a destructive agent into the fertilizer. No one of these three conditions is related to or has any reasonable connection with the plaintiff's real cause of action. It is both possible and probable that the fertilizer could have had a harmful substance in it and at the same time have had no deficiency of stated ingredients.

This injury to the plaintiff by the insertion into the fertilizer of a substance injurious to tobacco was an act not contemplated by any contract of sale, and it constituted a tort.

Bowers *v.* Railroad, 107 N. C., 721.

It would not make a misjoinder of causes of action to regard the first as in tort and the second on contract.

Reynolds *v.* Railroad, 136 N. C., 345.

Forms of action count for little in North Carolina, and the cause of action for injury by a harmful substance in the fertilizer is treated as a tort simply to establish similarity between this case and that of *Truax v. Corrigan*, 257 U. S., 312.

2. *By the general principles of law in North Carolina the defendant would be liable for the damages alleged.*

That the law in North Carolina prior to the enactment of this statute would have permitted plaintiff's recovery in this action is shown by the case of *Tomlinson v. Morgan*, 166 N. C., 557. In that case the court said:

> "Civil action to recover the contract price of certain fertilizers sold by plaintiff to defendant in 1907 for use on defendant's farm for that year and to foreclose a mortgage on certain personal property to secure the debt.
>
> "Defendant, admitting the amount and the execution of mortgage, set up a counterclaim and offered evidence tending to show that the guano in question was sold by plaintiff to defendant in 1907 for use on defendant's tobacco crop for that year, and was so sold to defendant as "Dunnington Special," a high-grade fertilizer, specially suited to tobacco and known

as '8-3-3 goods'; that defendant used good plants and same were properly put in and worked, and there was a marked diminution of his crop, arising from lack of proper manure; that the guano sold to defendant under said representation was off-grade or improperly mixed; that defendant's crop for that year was thereby seriously injured, and that the amount of damage done, attributable to this default, was from $400 to $500, etc.

"When the facts in evidence clearly meet the requirements, authority in this State is to the effect that the loss suffered in diminution of a given crop, when it is clearly attributable to a definite breach of warranty as to the quality of a fertilizer, that it is within the contemplation of the parties and capable of being ascertained with a reasonable degree of certainty, may be made the basis for an award of damages."

That case was decided in 1914, and this statute was passed in 1917.

There was some controversy on the trial as to whether the witness Williams was the agent of the defendant or of the plaintiff in the sale of this fertilizer. In either case there would be a privity of contract that would enable the plaintiff to maintain the action.

MacPherson *v.* Buick Motor Co., 217 N. Y., 382.
Johnson *v.* Cadillac Motor Co., 261 Fed., 878.

If it should be contended that Williams was an independent dealer, even if that fact should be definitely found by a jury, which is improbable, the action would still be good in North Carolina.

However these facts may be found, the plaintiff alleged that

Williams was the agent of defendant (paragraph 2 of complaint, Record, page 9) and introduced evidence to prove it (Record, page 18), and that entitles him to have that fact passed upon by a jury.

3. *The statute, in the absence of the required certificate, abolishes all remedy for damage caused by the insertion of a harmful substance in fertilizer, unless it was done dishonestly or fraudulently, or accompanied by a similar injury to another person.*

The statute seems to be concerned mostly with actions for damages because the crop was not aided by fertilizer on account of a deficiency of the stated ingredients. A "chemical analysis showing a deficiency of ingredients," made a prerequisite to the bringing of this action, has nothing to do with the additional presence of some harmful substance. This wrong was something that the Legislature very evidently did not have in mind in passing the statute, but the Supreme Court of the State has construed the statute as applying to that cause of action. The only alternatives given to one who has had his crop ruined are absurd. We must make it "*appear*" to the Department of Agriculture that the manufacturer in *other* goods offered in this State *during such season*, employed such ingredients as are outlawed by the provisions of this article; or he must make it "*appear* to the Department of Agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods." In other words the one injured, as this plaintiff has been, must find some other person who has a like cause of action against the same defendant,

and make that *appear* to the Department of Agriculture, although by what means the statute does not say. The Department may ignore the most convincing evidence, and simply announce that it does not appear. No process is provided for the plaintiff to secure witnesses before the Department, and the Department is not compelled to have a hearing. The Department of Agriculture might simply announce that they know defendant company and will hear no evil and believe no evil of it. In such case the plaintiff would be without remedy. As much may be said for the other alternative, requiring it to appear that the fertilizer was "dishonest or fraudulent goods." This leaves out entirely a cause of action based upon the negligent insertion of a harmful substance in fertilizer, because in such case there might be no deficiency of ingredients, no "other goods offered in this State during such season" by the same manufacturer, or none that contained outlawed substances, and no dishonesty or fraud. Thus the plaintiff is left entirely without remedy for the damage caused him by the defendant's placing in his fertilizer some substance that practically ruined his tobacco crop.

4. *A State cannot abolish all remedy for an admitted tort.*

The case of *Truax v. Corrigan*, 257 U. S., 312, is very similar to the case at bar. In that case a statute of Arizona denied the remedy of an injunction against ex-employees of the plaintiff who by picketing were seeking to induce the public to cease patronizing the establishment of the plaintiff. Our case is really stronger than that case, as here all remedy and redress of any kind is denied absolutely, while in that case the statute denied only the extraordinary remedy of

injunction, leaving the case for final trial on the question of damages. What is said by the court in that case is appropriate here:

> "It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles."

There is a denial of equal protection of the law by a statute which denies to one class of persons the right to recover damages from another class for a particular injury, leaving actions identical in principle for the benefit of all other classes.

> "Thus the guaranty was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted a class however limited, having the effect to deprive another class however limited of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class.
>
> "Mr. Justice Matthews, in Yick Wo *v.* Hopkins, 118 U. S., 356, 369; 6 Sup. Ct., 1064, 1070 (30 L. Ed., 220), speaking for the court of both the due process and equality clause of the Fourteenth Amendment said:

> "'These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.'
>
> "The accuracy and comprehensive felicity of this description of the effect of the equality clause are shown by the frequency with which it has been quoted in the decisions of this court. It emphasizes the additional guaranty of a right which the clause has conferred beyond the requirement of due process."
>
> Truax *v.* Corrigan, *supra.*

The Supreme Court of North Carolina has said that these statutes concerning fertilizers could be enacted under the police power.

Tomlinson *v.* Morgan, 166 N. C., 557.

It is to be doubted that this Court has ever given so broad a scope to the police power of the States, but even laws enacted under the police power, which would not be void under the due process clause, must comply with the requirements of the equal protection clause.

Atchison, T. & S. F. Ry. Co. *v.* Visburg, 238 U. S., 56.

In the case of *Park v. Detroit Free Press Co.*, 72 Mich., 560, cited with approval on the question of equal protection in *Truax v. Corrigan*, a statute was held unconstitutional which relieved publishers of newspapers from all but actual damages to property and business in actions for libel, if the publication was by mistake and in good faith, did not involve a criminal charge, and was followed by correction. The court very aptly said in that case:

> "It is not competent for the Legislature to give one class of citizens legal exemptions from liability for wrongs, not granted to others. And it is not competent to authorize any person, natural or artificial, to do wrong to others without answering fully for the wrong."

5. *The classification, with reference to a tort, of farmers on one side and fertilizer manufacturers on the other, cannot be sustained.*

Should any argument be made that the validity of this statute may be sustained because of a permitted classification, it seems that what is said in *Truax v. Corrigan* would dispose of it.

> "To sustain the distinction here between the ex-employees and other tort-feasors in the matter of remedies against them, it is contended that the Legislature may establish a class of such ex-employees for special legislative treatment. In adjusting legislation to the need of the people of a State, the Legislature has a wide discretion, and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that a classification of persons is constantly necessary, and that questions of proper classification are not free from difficulty. But we venture to think that not in any of the cases in this court has classification of persons of sound mind and full responsibility, having no special relation to each other, in respect to remedial procedure for an admitted tort been sustained."

If there was any attempt at classification under this statute its effect is to make the law in North Carolina so that all pur-

chasers of goods who are injured by some harmful substance inserted by the manufacturer have a remedy, except in cases between farmers and fertilizer manufacturers. Whether the statute abolishes all remedy or does not, it deprives this plaintiff, and all in his attempted classification, of the equal protection of the law, because all others are provided with an adequate remedy for such a wrongful invasion of property rights.

The classification under this statute resembles that condemned in *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540, where the court said:

> "These principles, applied to the case before us, condemn the statute of Illinois. We have seen that under that statute all except producers of agricultural commodities and raisers of live stock, who combine their capital, skill, or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and livestock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a State, and agriculturalists and raisers of livestock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is, of right open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe.
>
> "The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public

objects. For this court has held that classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality cause of the 14th Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Gulf, C. & S. F. Ry. Co. *v.* Ellis, 165 U. S., 150."

This statute makes an arbitrary selection of fertilizer manufacturers, and, distinguishing them from all other manufacturers, gives them special privileges and immunities from the consequences of the sale of their goods, and also makes an arbitrary selection of purchasers and users of fertilizers and imposes upon them special burdens and restrictions in securing redress for injuries done them by the manufacturer, which burdens and restrictions are not imposed upon those injured by the tortious insertion of harmful substances into other goods.

The unfairness of the statute is manifest. It requires the farmer to refuse to take the fertilizer manufacturer's word

that his fertilizer contains the ingredients in the proper proportion to help the growth of his crops, and to have it analyzed before using it. A person who is compelled to anticipate the commission of a tort upon him, and to comply with conditions precedent to the bringing of an action for a possible wrong before it is consummated, cannot be said to have the equal protection of the law.

In the case of *Truax v. Corrigan* the court speaks of the plaintiff in error being "stripped of all real remedy," and that case is relied upon as sustaining the proposition that this statute denies to plaintiff the equal protection of the law because it takes away from him all adequate remedy. This argument is also supported by the case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540:

> "But upon this general question we have said that the guaranty of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' Missouri *v.* Lewis, 101 U. S., 22, 31, *sub nom.* Bowman *v.* Lewis, 25 L. Ed., 989, 992. We have said also: 'The 14th Amendment, in declaring that no State "shall deprive any person of life, liberty, or property without the due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy prop-

> erty; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. Barrier *v.* Connolly, 113 U. S., 27, 31."

It is respectfully submitted that the requirement that every person shall have the equal protection of the law implies that redress for injuries shall be given to all upon equal terms by remedies according to one general principle of tort actions.

II. THE STATUTE DEPRIVES PLAINTIFF IN ERROR OF A PROPERTY RIGHT WITHOUT DUE PROCESS OF LAW.

1. *The statute makes the following conditions precedent to the maintenance of this action:*

> (*a*) "unless it shall appear to the Department of Agriculture that the manufacturer of said fertilizer in question has, in the manufacture of other goods offered in this State during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the Department of Agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods."

(*b*) "*Provided*, that no sample may be taken except within thirty days after the actual delivery to the consumer except by the State fertilizer inspector."

(*c*) "*Provided*, that no sample shall be drawn from less than ten bags of any one lot or brand."

(*d*) "*Provided*, such sample or samples shall be drawn with the same kind of instruments used by the inspectors of the Department of Agriculture in taking samples."

2. *All of these conditions are repugnant to the due process clause:*

(*a*) No statute can make any evidence conclusive.

The majority of the cases which have arisen upon statutes changing the rules of evidence have been concerned with presumptions. Very few of the States have tried to go so far as to enact statutes saying that any evidence should be conclusive. In practically all of such cases the statutes have been held to be void.

U. S. *v.* Klein, 13 Wall., 128.

Chicago, M. & St. P. Ry. Co. *v.* Minn., 134 U. S., 418.

Mo., K. & T. Ry. Co. *v.* Simonson, 64 Kan., 802.

In the case last cited the Court gives the statute and comments as follows:

> "And in any action hereafter brought against any railroad company, for or on account of any failure or neglect to deliver any such grain, seed, or hay to the consignee, or his heirs or assigns, either duplicate of such bill of lading, shall be conclusive proof of the amount of such grain, seed, or hay so received by such railway company."

"Is it in the power of the Legislature to thus create a conclusive presumption in a matter of private contract? We are constrained to believe that it is not."

* * * * * * *

"In Cooley, Const. Lim. 5th Ed., 452, it is said: 'But there are fixed bounds to the power of the Legislature over this subject which cannot be exceeded. As to what shall be evidence, and which party shall assume the burden of proof in civil cases, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretense of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the Legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or a forgery; public officers may connive with rogues to rob a citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law.'

"The theory on which all these cases proceed is that an act of the Legislature which undertakes to make a particular fact or matter in evidence involv-

lent. These three kinds of evidence have nothing to do with the cause of action of the plaintiff. He does not have to prove that the defendant dishonestly or fraudulently put a harmful substance into his fertilizer, but simply that it was there.

The proposition above stated seems to follow logically from the preceding proposition, and the reasoning of the following cases sustains this conclusion:

Chicago, M. & St. P. Ry. Co. *v.* Minnesota, 134 U. S., 418.

McFarland *v.* American Sugar Ref. Co., 241 U. S., 79.

Bailey *v.* Alabama, 219 U. S., 219.

Bettler *v.* Harris, 223 U. S., 437.

Mobile, J. & K. C. R. R. Co. *v.* Turnipseed, 219 U. S., 35.

In the *McFarland* case, above cited, it was said:

> As to the presumption, of course, the Legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."

The due-process clause is infringed upon by a statute which demands a certain kind of evidence as a condition precedent to the right to maintain the action just as it is by a statute which makes certain evidence conclusive. The effect of either is to deprive a party of the right to try his action on the real facts.

The general rule that seems to be laid down by all of the cases is that, while the Legislature may create presumptions, and that in limited ways only, it cannot deprive a party of the right to present facts that would rebut the presumption created, and that statutes which shut out all evidence of a good cause of action cannot be sustained.

The certificate of chemical analysis of this fertilizer, made by the chemist of the State Department of Agriculture (page 15 of Record) shows that there was a deficiency of the ingredients that the fertilizer was represented to contain. The plaintiff was denied the right to use this certificate as evidence because the sample used for analysis was not drawn from ten bags of the fertilizer, and because the plaintiff had used the fertilizer for the purpose for which defendant represented it to be good he was denied the privilege of introducing evidence of any analysis of it. The Supreme Court of North Carolina made much of the fact that this plaintiff bought fifty-one bags of the fertilizer and therefore said that he could not question the validity of the provision requiring samples to be drawn from at least ten bags, but that does not answer the contention that it is not due process of law to require the plaintiff, in advance of any injury to him, to provide himself with the "same kind of instruments used by the inspectors of the Department of Agriculture in taking samples," and to draw the samples within thirty days after delivery to him. The statute deprives the plaintiff of the privilege of making any contract for the purchase of fertilizer that will obviate the necessity of this expense and trouble.

(*d*) The statute is void because it substitutes the arbitrary discretion of an executive department for the judicial inquiry of the courts.

This statute, in cases where there is no certificate of chemical analysis showing a deficiency of ingredients, leaves it absolutely to the State Department of Agriculture, in its ungoverned discretion, to say whether there is a cause of action. It thus assigns a judicial function to an executive department without provisions for a hearing or for procuring witnesses. The arbitrary discretion granted makes this statute similar to the ordinance condemned in *Yick Wo v. Hopkins*, 118 U. S., 356, and also similar to one condemned by the Supreme Court of North Carolina in the case of *State v. Tennant*, 110 N. C., 609. The statute under consideration here may well have said of it what was said of a Minnesota statute in the case of *Chicago, M. & St. P. Ry. Co. v. Minn.*, 134 U. S. at page 456:

> "The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this Court, for the purposes of the present case, as conclusive and not to be re-examined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the Legislature of Minnesota by the statute, that the rates recommended and published by the Commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the Commission are the only ones that are lawful, and therefore in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not comply-

ing with the recommendations of the Commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the Commission, if it chooses to establish rates that are unequal and unreasonable."

"This being the construction of the statute by which we are bound in considering the present case, we are of the opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its rights to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

It seems that there are few principles of constitutional law under the Fourteenth Amendment that this statute does not violate. It destroys the freedom of contract, because in every case it makes void the seller's warranty that the goods sold are good for the purpose bought. It makes it that a farmer in North Carolina can make no contract with the seller of fertilizers that the fertilizer he is buying shall not contain a substance that will kill his crops.

Conclusion.

This statute is unique in prescribing that in order to maintain an action for an injury a condition precedent must be

complied with before the damage occurs. It makes a radical departure from all common-law rules as to remedies, and it seems that the absurdity of its provisions is enough to overcome the presumption of the constitutionality of a statute at the beginning of its consideration. The effort to have it declared unconstitutional is not an attempt "to prevent the making of social experiments that an important part of the community desires," but to secure redress for a property damage in a specific case. It is doubtful that the Legislature which passed this statute intended to sanction any such injury, but we submit that in doing so it transgressed its powers, and that the judgment should be reversed.

Respectfully submitted,

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Appendix.

Section 4697, Consolidated Statutes of North Carolina.

Collection and Analysis of Samples; Analyst's Certificate as Evidence.—The Department of Agriculture shall have the power at all times and at all places to have collected by its inspector samples of any commercial fertilizer or fertilizer material offered for sale in the State, and have the same analyzed; and such samples shall be taken from at least ten per cent of the lot from which they may be selected: *Provided*, that no sample shall be drawn from less than ten bags of any one lot or brand.

The samples must be drawn in the presence of either the agent or seller or dealer, or some other representative of the manufacturer: *Provided*, that when the agent or seller or dealer, or local representative of the manufacturer, is not present or refuses to act, two disinterested persons may act as witnesses.

The purchaser, or consumer, or the agent of either, may take fertilizer samples under the following rules and regulations: When any purchaser or consumer, or agent of either, desires to take a sample of any fertilizer or fertilizer material he may take such sample according to the rules prescribed by the Department of Agriculture in the presence of a county or local representative designated by the manufacturer, and notice of which shall be given by the manufacturer on the bill of lading, or, in case there is no county or local representative, or he is unable to serve for any cause, in the presence of an agent, seller, or dealer of the manufacturer and two disinterested freeholders; or, in case the agent, or seller, or dealer, or local representative of the manufacturer refuses to witness the drawing of such sample, a sample may be drawn in the presence of three disinterested freeholders: *Provided*, such sample or samples shall be drawn with the same kind of instrument used by the inspectors of the Department of Agri-

culture in taking samples, the sample to be thoroughly mixed as prescribed by the rules of the Department of Agriculture, divided into two parts, each part to be placed in a suitable vessel, securely sealed, properly labeled, and one part sent to the Department of Agriculture for analysis, and the other part to the manufacturer; and a suitable statement shall be signed by the parties taking, or witnessing the taking of the sample covering the matter; such statement or statements to be also sent to the Department of Agriculture and the manufacturer.

The Department of Agriculture shall make additional rules and regulations under and by which the purchaser or consumer, or agent of either, may take the sample or samples of fertilizer or fertilizer material as herein provided, and forward the same to the Department for analysis under the provisions of this article: *Provided*, that no sample may be taken except within thirty days after the actual delivery to the consumer except by the State fertilizer inspector.

In the trial of any suit or action wherein there is called in question the value or composition of any fertilizer, a certificate signed by the State chemist and attested with the seal of the Department of Agriculture, setting forth the analysis made by the State chemist of any sample of said fertilizer drawn under the provisions of this article, and analyzed by him under the provisions of the same, shall be *prima facie* proof that the fertilizer was of the value and constituency shown by his said analysis. And the said certificate of the State chemist shall be admissible in evidence to the same extent as if it were his deposition taken in said action in the manner prescribed by law for the taking of depositions. The Department shall refuse to analyze any sample of commercial fertilizer that is not drawn and forwarded to the Department in accordance with the regulations which it may adopt for the carrying out of this article: *Provided*, that no suit for damages from results of use of fertilizer may be brought except after chemical analysis showing deficiency of ingredients.

unless it shall appear to the Department of Agriculture that the manufacturer of said fertilizer in question has, in the manufacture of other goods offered in this State during such season, employed such ingredients as are outlawed by the provisions of this article, or unless it shall appear to the Department of Agriculture that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods.

Nothing in this article shall impair the right of contract. 1917, c. 143, s. 7; 1919, c. 120, ss. 2, 3.